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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

ERASMO GAMBINO and ANTHONY SPATOLA,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

Whether the trial court's decision to proceed with an eleven-person jury following the removal of a juror after deliberations had begun — despite the availability of an alternate juror and the defendants' consent to the empanelling of the alternate and express preference for a twelve-person jury — upon the grounds that Fed. R. Crim. P. 23(b) precluded the juror-substitution option, constituted reversible error?

Parties to the Proceeding

The parties to the proceeding in the United States Court of Appeals for the Third Circuit were Erasmo Gambino, Anthony Spatola, petitioners herein, Rosario Gambino and Antonio Gambino.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Erasmo Gambino and Anthony Spatola respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at page 1a. The opinion rendered by the United States District Court for the District of New Jersey appears in the Appendix at page 36a and is reported at 598 F. Supp. 646 (D.N.J. 1984). A motion *pro se* in the Third Circuit to recall the mandate was denied on May 27, 1986 and appears in the Appendix at 35a.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 18, 1986. This petition for certiorari is being filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes

Fed. R. Crim. Pro. 23(b):

> Rule 23. Trial by Jury or by the Court
>
> (b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

Fed. R. Crim. Pro. 24(c):

> Rule 24. Trial Jurors
>
> (c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualification, shall be subject to the

same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 2 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Statement of the Case

Petitioners were convicted after trial by jury before the United States District Court for the District of New Jersey (Lacey, J.) following a five-week trial for conspiring to distribute heroin (21 U.S.C. § 846), knowingly possessing and intent to distribute heroin (21 U.S.C. § 841(a)(1) and (b)(1)(A)), distributing heroin (21 U.S.C. § 841(a)(1) and (b)(1)(A)), and using a telephone in facilitating a conspiracy to distribute heroin (21 U.S.C. § 843(b) and (3) and 18 U.S.C. § 2). Two other defendants, Rosario Gambino and Antonio Gambino, were also convicted of violations of the federal drug laws. One defendant, Mario Gambino, was acquitted of all charges.

On December 6, 1984, Judge Lacey sentenced Erasmo Gambino to a total of 34 years in prison and imposed fines totalling $95,000. On April 18, 1986, the conviction was affirmed by the United States Court of Appeals for the Third Circuit (1a).

The trial in this case lasted over five weeks until the jury retired to commence deliberations. After charging the jury as to the applicable law, the trial judge, *sua*

sponte retained and sequestered two alternate jurors. The jury had deliberated well into the third evening when the foreman notified the court that three sheets of paper, not marked into evidence, had been discovered in the exhibit box. These documents were then marked and the court commenced an inquiry into the matter in the presence of all counsel and defendants.

Upon investigation, it was found that the documents belonged to the Assistant United States Attorney handling the prosecution and consisted of handwritten notes she had made about the case before the trial began. Significantly, the defendants bore no culpability for the misplaced papers which belonged to the government. During the questioning of the jury panel, it was established that two of the jurors had seen the documents in question, and that one juror had been irrevocably prejudiced by reading one of the documents. Consequently, at the close of the hearing, all defense counsel joined in a motion to dismiss the "tainted" juror and substitute one of the two alternates whom the court had retained. The government did not oppose the request.

At that time the court held that just cause existed to excuse the "tainted" juror but refused defense counsel's request to empanel an alternate opting instead to proceed with an eleven-member jury. The court, over vehement defense objections, stated at that time that Fed. R. Crim. Pro. 23(b) compelled him to use an eleven-member jury and discharge the two alternates.

REASONS FOR GRANTING THE WRIT

The Trial Court's Decision to Proceed with an Eleven-Person Jury Following the Removal of a Juror After Deliberations Had Begun — Despite the Availability of an Alternate Juror and the Defendants' Consent to Empanelling of the Alternate and Express Preference for a Twelve-Person Jury — Upon the Grounds That Fed. R. Crim. P. 23(b) Precluded the Juror-Substitution Option, Constituted Reversible Error.

This case is ideally suited to review by this Court because it raises an important issue of constitutional and federal law including the appropriate interpretation of the recently enacted amendment to Rule 23(b) of the Federal Rules of Criminal Procedure. This issue has not previously been decided by this Court and impacts directly on the petitioners' Sixth Amendment right to a trial by jury and on the administration of criminal justice.

The facts of this case as set forth, *supra*, are undisputed. In some unexplained fashion certain unmarked documents belonging to the government were introduced into the jury room. When it was discovered that one of the jurors had been "tainted" by said documents, a choice had to be made between empanelling an alternate as defense counsel requested, or proceeding with an eleven-person jury, as the court ultimately selected. We respectfully submit that the court erred in interpreting Fed. R. Crim. Pro. 23(b) as mandating an eleven-person jury over the express request by defense counsel to empanel an alternate.[1]

Rule 23(b) explicitly declares that "juries shall be of twelve" as a general principle with two well-defined and limited exceptions. First, at any time prior to the verdict, the parties may stipulate in writing with the court's approval to a jury of less than twelve. Second, where there is no stipulation between the parties, as in this case, if the court finds it necessary to excuse a juror for just cause after the jury has retired to deliberate, the

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[1] Fed. R. Crim. P. 23(b) provides, as follows:

> (b) *Jury of Less Than Twelve.* Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

remaining eleven jurors may return a valid verdict. The latter provision enacted as an amendment to Rule 23(b) became effective on August 1, 1983.

The district court's interpretation of the amendment is that in a situation where only *one* juror is excused for just cause after deliberations have commenced, the court's sole recourse is to proceed with an undermanned eleven-person jury even if there are alternates available and the defendants request empanelment of an alternate. By invoking a blanket prohibition against installing an alternate where one juror is dismissed for just cause after deliberations have begun, the court evaded its obligation to explore the feasibility of empanelling one of the available alternates as defense counsel requested.

The petitioners are cognizant of Fed. R. Crim. Pro. 24(c) which states that alternate jurors should be discharged after the jury retires to consider its verdict. Nevertheless, where, as in this case, the district court decides to keep the alternates even after jury deliberations have begun, in all likelihood to defend against a potential mistrial, it is incumbent on the court to explore the possibility of empanelling an alternate when that is the explicit preference of defense counsel.

The validity of the petitioners' position becomes especially apparent when one considers that it was purely fortuitous that only one juror was tainted in this case and had to be excused rather than two. To avoid a mistrial after five weeks of trial, if two jurors had had to be excused, the court would have actively explored the possibility of empanelling the two alternates. Indeed, the district court explicitly stated so in its opinion (63a). Surely, the petitioners' entitlement to a full complement of twelve jurors did not hinge on so thin a reed as whether one or two of the jurors was tainted. Accordingly, as the "two tainted jurors" example demonstrates, the eleven-juror solution is only the preferred solution not the statutorily mandated solution.

It should be noted that in cases previous to the amendment of Fed. R. Crim. Pro. 23(b), on facts similar to those herein, courts regularly empanelled alternate

jurors. For example, in *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981), *cert. denied,* 457 U.S. 1136 (1982), after a lengthy trial, the judge ordered one of the alternate jurors to be separately sequestered but not dismissed. After two days of deliberations, one of the jurors suffered a heart attack and was unable to continue. The district court questioned the alternate juror and found that he had not discussed the case with anyone and felt able to work from the start with the other jurors. The court also questioned the regular jurors, who indicated that they would be able to begin their deliberations anew. The Court substituted the alternate over the objection of defense counsel and instructed the jury to start the deliberations once again. Six days later the reconstituted jury reached a verdict.

Although *Phillips* predated the amendment to Rule 23(b), it certainly demonstrates that the empanelment of alternates after deliberations have begun often is, and we submit would have been in this case, consistent with the interests of justice. See *United States v. Hillard,* 701 F.2d 1052 (2d Cir.), *cert. denied,* 461 U.S. 958 (1983); *United States v. Kopituk,* 690 F.2d 1289 (11th Cir. 1982), *cert. denied,* 461 U.S. 928 (1983).

The sole drawback to the alternate juror substitution option espoused by defense counsel is the potential prejudice to the defendant. Inasmuch as the defendants and their counsel, who were in the best position to assess any risks were the ones opting for substitution, the court erred in denying the defendants the opportunity to explore the viability of substitution.

Since in this case the defendants were neither responsible nor in any way blameworthy for the incident resulting in the excusal of a sitting juror and since the district court had retained two alternates in prescient anticipation of the precise emergency which arose, the defendants' request to have their fates determined by a twelve-member jury should have been scrupulously honored.

Conclusion

For all the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-5842, 84-5843, 84-5866,
84-5880 & 85-5396

UNITED STATES OF AMERICA

v.

GAMBINO, ROSARIO, ERASMO GAMBINO,
ANTONIO GAMBINO, AND ANTHONY SPATOLA,

Appellants

On Appeal from the United States
District Court for the
District of New Jersey
(D.C. Crim. No. 84-00098-01)
(D.C. Crim. No. 84-00098-02)
(D.C. Crim. No. 84-00098-05)
(D.C. Crim. No. 84-00098-04)

Argued: January 8, 1986

Before: WEIS, HIGGINBOTHAM and BECKER,
Circuit Judges
(Filed APRIL 18, 1986)

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Appendix A
Opinion of United States Court of Appeals

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Appendix A
Opinion of United States Court of Appeals

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Court.*

Appellants[1] Rosario Gambino, Erasmo Gambino, Antonio Gambino and Anthony Spatola were indicted by a federal grand jury on multiple counts of narcotics related offenses. They were convicted *inter alia* of conspiring to distribute heroin in violation of 21 U.S.C. § 846. Appellants now appeal from their judgments of conviction. Alternatively, appellants urge that their sentences be vacated and their cases remanded for resentencing. For the reasons set forth below, we will affirm the district court.

I.

Pursuant to a multi-count indictment, appellants Rosario Gambino, Erasmo Gambino, Antonio Gambino, and Anthony Spatola were convicted of conspiracy to distribute heroin in violation of 21 U.S.C. § 846. Indicted along with the appellants on the conspiracy charge and related offenses were Mario Gambino and Giovanni Bosco. At the conclusion of the trial, Mario Gambino was acquitted on all counts with which he was charged. Bosco remained a fugitive throughout the trial. Rosario Gambino, Erasmo Gambino, and Anthony Spatola were convicted on two counts of possession of heroin and two counts of distribution of heroin in contravention of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). Antonio Gambino was convicted on three counts of those offenses. The

[1] Because three of the appellants bear the same surname, Gambino, for purposes of clarity they will be referred to by either their full names or their first names.

remaining counts contained charges of using the telephone to facilitate a conspiracy to distribute heroin in violation of 21 U.S.C. §§ 843(b) and (c). Rosario Gambino was convicted on one count of this offense; Erasmo Gambino, on two counts; Antonio Gambino, on three counts; and Anthony Spatola, on six counts.

Subsequent to the jury verdict, the district court imposed the following sentences on the defendants:

> Rosario Gambino - Three consecutive fifteen-year prison terms; one concurrent four-year term; terms of Special Parole, and total fines of $105,000.
>
> Erasmo Gambino - two consecutive fifteen-year prison terms; one concurrent fifteen-year prison term; two concurrent four-year terms; terms of Special Parole, and total fines of $95,000.
>
> Antonio Gambino - two consecutive fifteen-year prison terms; two concurrent fifteen-year prison terms; three four-year prison terms concurrent with each other and consecutive to the fifteen-year prison term; terms of Special Parole, and total fines of $50,000.
>
> Anthony Spatola - two consecutive fifteen-year prison terms; one concurrent fifteen-year prison term; six four-year prison terms concurrent with each other and consecutive with the fifteen-year prison term; Special Parole, and total fines of $50,000.

Three primary questions are presented on this appeal from the district court's entry of judgments of conviction against the appellants for conspiracy to distribute heroin and against each of them individually for various related substantive offenses: (1) whether the evidence adduced

at trial established the impermissible entrapment of appellant Antonio Gambino as a matter of law; (2) whether the district court abused its discretion pursuant to Federal Rule of Criminal Procedure 23(b) by allowing deliberations to proceed with an eleven person jury despite the availability of an alternate juror, or alternatively, whether the district court committed legal error in interpreting Rule 23(b) as precluding substitution of alternate jurors; and (3) whether appellant Rosario Gambino's sixth amendment right to effective assistance of counsel was violated because his trial lawyer's performance was adversely affected by a conflict of interest.[2]

II.

FACTUAL BACKGROUND

Antonio Gambino

On October 23, 1983, during the course of an undercover operation investigating drug trafficking in the

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[2] Other contentions raised by the appellants not directly addressed in this opinion, include:

1. That remarks made by the prosecution in summation attacking the credibility of Anthony Spatola denied Rosario Gambino due process and a fair trial.
2. That the district court erred in denying Rosario Gambino's motion for a new trial and a motion for related discovery.
3. That appellants were denied a fair trial when the district court permitted the prosecutor to read an alleged prejudicial newspaper article to the jury.
4. That Antonio Gambino's due process rights were violated by outrageous government conduct.

After thoroughly reviewing the above contentions, we conclude that they lack merit. Accordingly, the judgment of the district court will be affirmed.

New Jersey area, Special Agent Michael Glass of the Federal Bureau of Investigation was introduced to Antonio Gambino by a government informant called "Hank." During the meeting, which was recorded by Agent Glass, Antonio Gambino agreed to sell Glass a small quantity of cocaine and also indicated that he had access to and could provide Glass with a sample of heroin. App. 1641a-1644a, 1654a-1656a. While Antonio never specifically disclosed the source of his drug supply, he intimated that his suppliers were members of his family. *See* App. 166a, 758a.

Following this meeting, Antonio met with Agent Glass on a number of occasions to sell cocaine and to continue discussions about the impending heroin deal. On December 27, 1983, shortly over two months after their initial meeting, Antonio Gambino supplied Agent Glass with a sample of heroin. Glass was in turn to deliver the sample to his contacts in Las Vegas who would then decide, based upon the quality of the sample, whether they wanted to purchase a kilogram. App. 781a-789a. Three days later, on December 30, 1983, Agent Glass telephoned Antonio and informed him that the sample was satisfactory and that he was interested in consummating their proposed heroin deal.

In another series of recorded conversations, Antonio Gambino, using code language, discussed the arrangements for the drug deal with various people. Thereafter, on January 18, 1984, Antonio Gambino, together with two of his co-conspirators, Anthony Spatola and Giovanni Bosco,[3] delivered approximately one half kilogram of heroin to Agent Glass and two other undercover agents. The transaction took place between Rooms 311

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[3] Giovanni Bosco was a co-defendant in the underlying action. At the time of trial Bosco had not been arrested and remained a fugitive for over a year. He was apprehended on April 19, 1985 and was awaiting trial at the time of this appeal.

and 858 of Caesar's Boardwalk Regency Hotel in Atlantic City, New Jersey and was secretly videotaped by the FBI. On February 20, 1984, Antonio Gambino participated in the sale of a second half kilogram of heroin to Agent Glass and another undercover agent. Antonio Gambino's particular objection on appeal is that the evidence adduced at trial demonstrated entrapment as a matter of law.

Anthony Spatola

Immediately after Agent Glass authorized Antonio Gambino to negotiate the purchase of one kilogram of heroin, Anthony Spatola made a series of phone calls, which were intercepted by authorized wiretaps, attempting to contact Erasmo Gambino. Eventually a meeting between Erasmo Gambino and Anthony Spatola was arranged to discuss the proposed transaction. Spatola met with Erasmo at the Playboy Casino Hotel on January 3, 1984. On the following evening, Spatola was introduced to Agent Glass by Antonio Gambino in a meeting devoted to discussing the mechanics of the proposed heroin purchase. Agent Glass was required to wear a bathing suit and meet with Spatola in a jacuzzi at the Golden Eagle Motel in Cape May to assure that the meeting was not being recorded. App. 855a-857a. The heroin sale was scheduled for January 16 or 17.

On January 13, 1984, Agent Glass telephoned Antonio Gambino to advise him that all financial and personnel arrangements necessary for the completion of the heroin deal had been made. Glass suggested that the transaction occur on Tuesday, January 17, 1984. During this discussion, Antonio Gambino extensively used code language to refer to the heroin purchase, particularly employing references related to "marriage" and "cars." App. 241a-251a. Immediately thereafter, Antonio Gambino phoned Spatola and informed him that the sale

would take place on Tuesday. App. 253a, 871a. Similar code language was used in this conversation and in a subsequent conversation between Spatola and Erasmo Gambino in which the two discussed the need to pick up the "fiance", i.e., heroin, on Monday.

Prior to the sale, intercepted telephone conversations and observations of surveillance agents revealed that Spatola made numerous attempts to contact Rosario and Erasmo Gambino either to obtain approval of the pending negotiations or to obtain the heroin for the drug deal. Ultimately, Spatola was present for the actual heroin sales on both January 19, 1984 and February 20, 1984. Spatola's appeal focuses on the propriety of the eleven person jury verdict.

Erasmo Gambino

Following Erasmo Gambino's meeting with Spatola at the Playboy Casino Hotel, a series of intercepted phone calls involving Antonio Gambino and Spatola revealed their persistent efforts to again contact Erasmo apparently to enlist his assistance in obtaining the heroin for the impending deal. App. 264a-265a, 270a-274a. Three of those calls were placed to the Caffe Milano in Brooklyn, New York. App. 275a-276a, 284a, 286a. Finally, on January 17, 1984, Erasmo placed a collect call to Spatola and told him that there had been a delay and that the sale could not be completed until Thursday. App. 306a-307a. After further efforts on the part of Spatola and Antonio Gambino, however, a sale of approximately one half kilogram of heroin was arranged and completed early Wednesday morning.

During the discussions surrounding the transaction that morning, Antonio Gambino and Spatola discussed with undercover agents the possibility of providing a steady supply of heroin. App. 400a-438a. Left unresolved was the amount of heroin Antonio and Spatola would be

able to produce on a monthly basis. On January 20, 1984 Antonio Gambino met with Special Agent Glass to continue discussions about future sales. App. 1048a-53a. Agent Glass told Antonio that before another deal could be approved, the quality of the heroin purchased two days earlier had to be tested. App. 1057a. Later that same day, Antonio had a telephone conversation with Erasmo Gambino in which Antonio stated "I spoke with him today . . . and he told me, its because he has to speak to that guy --the other guy, no?" App. 456a-57a. Antonio then suggested that he call Erasmo in five minutes from an "outside phone" so that he could "speak more freely." *Id.*

Two other phone calls involving Erasmo Gambino from which his involvement in the drug transactions could be inferred were intercepted by authorized wiretap on January 22, 1984. App. 503a, 546a. Prior to the sale of the second half kilogram, Erasmo was observed with Spatola and Giovanni Bosco in Brooklyn at the Caffe Milano on February 2, 1984. App. 2667a-2670a. Several days later Erasmo apparently met with Spatola and Antonio Gambino in Philadelphia. App. 604a-605a, 608a-609a, 2066a-2067a. The second heroin transaction was completed on February 20, 1984. Both Spatola and Antonio were present at the sale.

Erasmo Gambino's principal contention on appeal alleges reversible error in the district court's decision to proceed with an eleven person jury.

Rosario Gambino

Rosario Gambino was first implicated in the heroin conspiracy on January 17, 1984 when Anthony Spatola and Antonio Gambino were desperately seeking heroin to sell to Agent Glass the following day. On that day Spatola and Giovanni Bosco met at the Caffe Milano in Brooklyn at approximately 2:27 p.m. App. 2091a-2094a,

2109a-2110a. Approximately thirteen minutes later, a yellow Mercedes Benz bearing New Jersey registration 228-VIF was observed leaving the curb in front of Caffe Milano. App. 2080a. Although the residence and insurance policy listed on the registration were false, App. 2471a-2472a, 2571a-2573a, during the course of the investigation the automobile was frequently observed at the residence or in the use of Rosario Gambino. App. 2215a-2216a, 2473a.

In an intercepted phone conversation later that day, Anthony Spatola conveyed to Antonio Gambino that he had talked to his cousin,[1] the "short guy," who indicated that he would try to get the "car." App. 318a-319a. About an hour later, Spatola again talked to Antonio, this time to confirm that the "short guy" would produce one half of the heroin immediately as a favor to Spatola. App. 321a. In yet another phone conversation, between Spatola and Antonio, Spatola indicated that the heroin would arrive at the Caffe Milano between eleven and eleven-thirty that evening. App. 968a-972a. At approximately 11:19 p.m., the yellow Mercedes was again observed at the Caffe Milano, and at 11:29 p.m., it was observed departing. App. 2237a-2238a.

Spatola and Bosco left the Caffe Milano at 1:10 a.m. on January 18, 1984, and drove to Caesar's Boardwalk Regency Hotel in Atlantic City where the drug transaction was completed. App. 349a-438a, 2239a-2240a. Spatola, Bosco and Antonio Gambino rented Room 311 at Caesar's to use during the drug transaction. At approximately 8:20 a.m., shortly before Spatola, Bosco and Antonio checked out of the hotel, a call was placed from Room 311 to the residence of Rosario Gambino. App. 2047a-2051a. Upon leaving the hotel, Spatola, Bosco and Antonio drove directly to Rosario Gambino's residence in Cherry Hill, New Jersey, arriving there at

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[1] Rosario Gambino and Anthony Spatola are cousins. App. 4608a.

approximately 9:30 a.m. App. 2475a. Parked outside of Rosario's residence when the trio arrived was the yellow Mercedes Benz, New Jersey registration number 228-VIF. App. 2579a. The three men left Rosario's home at about 10:40 a.m. App. 2502a.

Pursuant to ongoing heroin negotiations, Agent Glass communicated with Antonio Gambino several times after the January 18 transaction to determine whether future sales would occur. These negotiations were complicated by highly publicized heroin arrests which took place in Philadelphia on January 26, 1984. During a meeting with Spatola and Antonio Gambino on January 27, Agent Glass showed them a Philadelphia Daily News article in which the arrests were discussed. App. 1161a. There were many similarities between the ongoing heroin negotiations and the ones which had taken place in Philadelphia, including complaints about dilution of the heroin. App. 1162a-1168a. Consequently, Agent Glass encountered some difficulty in making arrangements for the second purchase. App. 515a-579a.

On January 30, 1984 a number of phone calls either directly involving Rosario Gambino or making reference to him through code names such as "Saruzzo" and "the short one," were intercepted by FBI wiretap. App. 586a-592a. Those conversations revealed ongoing efforts to schedule a second sale of heroin to Agent Glass. Eventually an agreement was reached to conduct the next sale on February 2, 1984. App. 594a. The planned transaction was aborted, however, due to the continuing apprehensiveness of Antonio's suppliers in the wake of the Philadelphia arrests. App. 1242a.

Finally, on February 20, 1984, the second transaction was completed. Agent Glass and another undercover agent purchased a second half kilogram of heroin from Antonio and Spatola for $120,000. App. 622a-669a, 1352a. Copies of the bills used to purchase the heroin were made and maintained. App. 1352a. On March 16, 1984 Rosario

Gambino was arrested and a search of his residence conducted. Two of the $100 bills used to purchase the heroin were seized from Rosario Gambino's master bedroom. App. 3421a-3422a, 4035a, 4130a.

On appeal, Rosario Gambino alleges that his sixth amendment right to effective assistance of counsel was violated because his trial lawyer's performance was adversely affected by a conflict of interest.

III.

ENTRAPMENT

In this circuit, to be entitled to an entrapment charge, a defendant must first present evidence both that the government initiated the crime, regardless of the amount of pressure applied, and that the defendant was otherwise not predisposed to commit the crime. *See United States v. Jannotti*, 729 F.2d 213, 224 (3d Cir. 1984) (*Jannotti II*) (citing *United States v. Watson*, 489 F.2d 504, 509 (3d Cir. 1973)). In the instant case, appellant Antonio Gambino demanded an entrapment charge based on evidence that (a) Special Agent Glass initiated the topic of heroin sales during negotiations for a cocaine purchase, and (b) there were several instances in their initial meeting where Antonio expressed hesitancy to arrange the heroin sale, and later where his lack of knowledge about the heroin business was revealed to the Agent Glass. App. 4943a-4944a. Accordingly, the trial judge submitted the issue of entrapment to the jury pursuant to a jury charge which is not challenged on this appeal. App. 5876a-5878a. The jury rejected the defense of entrapment and returned a verdict of guilty against Antonio Gambino on ten of the twelve counts with which

he was charged.[5] Antonio Gambino argues on appeal that his convictions nevertheless should be reversed because he was entrapped as a matter of law. We disagree.

Although appellant Antonio Gambino met the threshold evidentiary requirements entitling him to an entrapment instruction, we are unconvinced on this record that he is entitled to have his defense sustained as a matter of law. Where the evidence is undisputed that the defendant had no predisposition to commit the crimes with which he is charged, and was induced to do so only by the trickery, persuasion or fraud of the government, entrapment is established as a matter of law. *See United States v. Kaminski,* 703 F.2d 1004, 1007 (7th Cir. 1983). *See also Sherman v. United States,* 356 U.S. 369, 372 (1958) ("Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials"); *United States v. Jannotti,* 673 F.2d 578, 597 (3d Cir.) (en banc), *cert. denied,* 102 S. Ct. 2906 (1982) (*Jannotti I*) ("Entrapment occurs when a defendant who was not predisposed to commit the crime does so as a result of the government's inducement"). In general, however, entrapment is a jury question, *see United States v. Bocra,* 623 F.2d 281, 289 (3d Cir.), *cert. denied,* 449 U.S. 875 (1980), and "[t]he ultimate factual decisions . . . must be left to the jury." *Jannotti I,* 673 F.2d at 606.

To establish his claim of entrapment as a matter of law, Antonio Gambino first argues that Special Agent Glass induced him to sell heroin. However, even if the agent is presumed to have induced the sale by his initial inquiry and subsequent expressions of interest, government inducement alone does not establish entrapment

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[5] The only two counts upon which Antonio was acquitted were counts 6 and 9 in which he was charged along with Mario Gambino with using the telephone to facilitate a conspiracy to distribute heroin. These were the only telephone counts with which Mario Gambino was charged and he was acquitted of all charges.

as a matter of law. Rather, the key consideration upon review is whether the undisputed evidence shows a lack of predisposition on the part of the accused. *Hampton v. United States,* 425 U.S. 484, 488 (1976); *United States v. Russell,* 411 U.S. 423, 436 (1973). Evidence concerning predisposition is not undisputed if the determination depends upon the credibility of witnesses or the interpretation of the evidence. *See United States v. Pennell,* 737 F.2d 521, 534 (6th Cir. 1984), *cert. denied,* 105 S. Ct. 906 (1985); *Bocra,* 623 F.2d at 289; *United States v. Spain,* 536 F.2d 170, 173-74 (7th Cir.), *cert. denied,* 429 U.S. 833 (1976).

Appellant presents two arguments alleging that the undisputed evidence demonstrates his lack of predisposition to engage in the criminal conduct for which he was convicted. First, Antonio Gambino argues that government evidence regarding his involvement in cocaine trafficking established predisposition to sell only cocaine, not heroin. In support of his position, however, appellant can point only to the eloquent dictum of Mr. Justice Frankfurter in *Sherman*: "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." 356 U.S. at 382-83 (Frankfurter, J. concurring in result). In so doing, however, appellant merely attempts to shift the focus away from his own behavior by rehashing the proposition that has been considered and rejected several times by the United States Supreme Court, *viz.* whether excessive governmental conduct, if proved, in itself negates evidence of predisposition, or, put otherwise, whether the entrapment defense should be defined in terms of the government's conduct rather than the defendant's state of mind. *See Hampton v. United States,* 425 U.S. 484, 495-99 (1976) (Brennan, J. dissenting); *United States v. Russell,* 411

U.S. 423, 437-39, 439-43 (1973) (Douglas, J. dissenting) (Stewart, J. dissenting); *Sherman v. United States,* 356 U.S. 369, 378-83 (1952) (Frankfurter, J. concurring in result); *Sorrells v. United States,* 287 U.S. 435, 458-59 (1932) (Roberts, J. dissenting).[6] While we recognize that government inducement is not wholly irrelevant to the determination of defendant's predisposition, *see Watson,* 489 F.2d at 511 ("the stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the inducement rather than to the defendant's own predisposition"), in ascertaining predisposition we focus on 'the defendant's state of mind and inclinations *before his initial exposure to government agents.' United States v. Kaminski,* 703 F.2d 1004,

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[6] In United States v. Russell, the majority opinion conceded that there "may some day be . . . a situation in which the conduct of the law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. Subsequently, this court accorded recognition to this principle in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), holding on its facts that the "nature and extent of police involvement . . . was so overreaching as to bar prosecution of the defendants as a matter of due process of law." 588 F.2d at 377.

Antonio Gambino separately alleges a due process violation and implores this Court to overturn his conviction even if we find sufficient evidence on the issue of predisposition. Despite the holding in *Twigg,* this court and other appellate courts have since exercised extreme caution in finding due process violations in undercover settings. *See e.g.,* United States v. Beverly, 723 F.2d 11, 12-13 (3d Cir. 1983); United States v. Alexandro, 675 F.2d 34, 40-41 (2d Cir.), *cert. denied,* 103 S. Ct. 78 (1982); *Jannotti I,* 673 F.2d at 607-608. Thus, "a successful due process defense must be predicated on intolerable government conduct," and an appellate court should "exercise scrupulous restraint before . . . denounc[ing] law enforcement conduct as constitutionally unacceptable." *Jannotti I,* 673 F.2d at 607. On the facts before us, we do not find the type of egregious government misconduct that is repugnant to the concept of fundamental fairness. Accordingly, we reject Antonio's due process argument.

1008 (7th Cir. 1983) (quoting *United States v. Jannotti*, 501 F. Supp. 1182, 1191 (E.D. Pa. 1980), *rev'd on other grounds*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, 457 U.S. 1106 (1982) (emphasis added)).

An appellate court reviewing a record in an effort to divine a defendant's predisposition to commit a crime must examine a variety of factors. The second circuit has enumerated three categories of evidence from which the government may discharge its burden of proof on the issue of predisposition: "the Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." *United States v. Viviano*, 437 F.2d 295, 299 (2d Cir.), *cert. denied*, 402 U.S. 983 (1971).[7] Evidence of Antonio Gambino's ongoing involvement in cocaine trafficking is clearly subsumed by the category of evidence noted in item one. Nevertheless, appellant submits that evidence of such involvement cannot provide the basis for a determination that he was predisposed to engage in similar activity where the government agent conceded that his "primary goal" was to induce appellant to engage in the sale of heroin.

Other courts, however, although focusing on problems of admissibility, have recognized the probative value of similar acts evidence on the issue of a defendant's predisposition to commit comparable crimes where a defense of entrapment was raised. *See e.g., United*

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[7] We cite *Viviano* solely to illustrate the types of evidence which may support a finding of predisposition. Nothing in our reliance on *Viviano* effects this court's rejection of the bifurcated entrapment charge, *see Jannotti II*, 729 F.2d at 224, embraced in that opinion.

States v. Segovia, 576 F.2d 251, 252-53 (9th Cir. 1978) ("the probative value of appellant's willingness to arrange for a sale of a significant quantity of marijuana in the context of his entrapment defense in a trial for similar activities involving cocaine cannot be disputed"); *see also United States v. Williams*, 705 F.2d 603, 623 (2nd Cir. 1983) (in ABSCAM prosecution evidence of conduct 'morally indistinguishable' from offense charged was probative of defendant's willingness to engage in similar activity); *cf. United States v. Murzyn*, 631 F.2d 525, 528-29 (7th Cir. 1980) (discussing the appropriate and reasonable restraints on the use of character evidence to prove disposition). The dictum quoted in *Segovia* is particularly apropos:

> "Merely because the drugs involved are different does not strip this conduct of its evidentiary value. The past acts of negotiation leading to the distribution of one drug is [are] relevant to show knowledge, motive and intent on the part of appellant to partake in the attempt here to import commercial quantities of yet another drug for purposes of distribution. The relevant factor is the type of activity undertaken, not the identity of the drugs."

Segovia, 576 F.2d at 252 (quoting *United States v. Batts*, 573 F.2d 599, 603 (9th Cir. 1978)). That the determination of the weight of the evidence and inferences to be drawn therefrom is exclusively within the province of the jury is a vital linchpin of our criminal justice system. We think that the issue whether appellant's involvement in the heroin transactions for which he was convicted was solely a result of government inducement or rather, the result of a predisposed criminal mind as evidenced by his prior cocaine dealings, was properly left to the jury.

Nor do we find any persuasive force in Antonio Gambino's suggestion that, viewed independently of government inducement, evidence of his prior involvement with cocaine was insufficient to establish predisposition. Indeed, we need not reach the issue whether, standing alone, evidence of prior similar activity is sufficient proof of predisposition, for there is ample additional evidence on this record from which predisposition may be inferred.[8]

The record reflects, despite appellant's contention to the contrary, that the government also produced evidence that Antonio exhibited a willingness to enter into the heroin transactions. Relying on *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984), Antonio Gambino argues that his initial reluctance to engage in heroin sales was only overcome after repeated inducements by Agent Glass. We do not find Gambino's argument convincing. The facts of *McLernon* are clearly distinguishable from those presented in this case. *McLernon* involved a situation whereby a government agent over a period of years became the accused's "blood-brother," and preyed upon that relationship by convincing the accused that the agent would be murdered if the accused did not aid in negotiating a cocaine deal. *McLernon*, 746 F.2d at 1113. We conclude that the evience with regard to Antonio's willingness to sell heroin and the sundry interpretations urged by the parties were properly before the jury for resolution. On review, our task is to determine whether, viewing the evidence in the light most favorable to the government, there was sufficient evidence for a rational jury to find that the defendant was predisposed. *Burks v. United States*, 437 U.S. 1, 16 (1978); *Jannotti I*, 673 F.2d at 598. After

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[8] Antonio Gambino argues that "[t]he only evidence of predisposition on the part of appellant rests upon the allegation that he had previously sold cocaine." Brief for Appellant Antonio Gambino at 7.

After a thorough examination of the record before us, we do not find that the jury was unreasonable in concluding beyond a reasonable doubt that Antonio Gambino was predisposed to engage in heroin trafficking. Accordingly, the jury's determination will not be disturbed.

IV.

RULE 23(b) AND THE ELEVEN-PERSON JURY

Appellants Erasmo Gambino and Anthony Spatola both contend that the district court committed reversible error when, after excusing a juror for cause after jury deliberations had commenced, the court permitted a verdict to be returned by an eleven-person panel over the objection of all of the defendants.[9] Appellants concede that they have no constitutional right to a twelve-person jury, *see Williams v. Florida*, 399 U.S. 78, 103 (1970), but insist that where alternate jurors are available, albeit in contravention of Federal Rule of Criminal Procedure 24(c),[10] defendants are entitled, at a minimum, to a determination whether the jury could begin its deliberations anew upon the substitution of a properly sequestered alternate. Absent a finding of potential prejudice to the parties, appellants argue that the preference of the defendants -- in this case juror-substitution -- should be honored.

The events percipitating this challenge are as follows:[11]

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[9] Each appellant has invoked Rule 28(i) of the Federal Rules of Appellate Procedure, joining the arguments of their co-appellants insofar as those arguments are applicable to them and not inconsistent with the arguments in their briefs. Presumably, all appellants join in this argument.

[10] See *infra* note 13.

[11] A more detailed account of these facts is found in Judge Lacey's opinion in United States v. Gambino, 598 F. Supp. 646, 658-60 (D.N.J. 1984).

At the time that the jury retired to begin deliberations, Judge Lacey decided to retain two alternate jurors in sequestration. App. 5903a-5909a. After over twenty hours of deliberation, the jury notified the court through their foreman that three documents, not marked into evidence, had been discovered in the exhibit box. The court immediately marked the note from the jury and the three documents as Court Exhibits C-22, (a), (b), and (c), respectively, and promptly conducted an inquiry into the matter with counsel and in the presence of all of the defendants.

Upon questioning the jury panel, the court determined that only jurors four and five had seen any of the unauthorized documents. Neither juror had discussed what they had viewed with the other members of the panel. Only one of the two, juror number five, had viewed a document that the court and counsel considered potentially prejudicial. As a result, at the conclusion of the hearing all defense counsel joined in a motion to remove juror number five and substitute him with one of the two alternates the court had retained at the time the jury retired. The government did not oppose this request. Notwithstanding the desires of defense attorneys to return the jury to its full complement of twelve, the court found just cause to remove juror number five but refused to replace him with the first alternate, noting instead that Rule 23(b) compelled him to proceed with an eleven person jury. At that juncture the court discharged the two alternate jurors. Later that day, the remaining 11 jurors rendered a verdict.

Rule 23(b)[12] of the Federal Rules of Criminal Procedure authorizes the trial court, in its discretion, to

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[12] Rule 23(b) provides:

> (b) **Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of
>
> *(fotnote continued on following page)*

proceed with a jury of eleven in the event a juror is excused for cause after the jury has retired to consider its verdict. Appellants argue nonetheless that Judge Lacey misinterpreted Rule 23(b) as precluding the option of substituting an available alternate for the excused juror.[13]

Thus, appellants do not challenge the district court's discretion to proceed with an eleven-person jury; rather, they charge that that discretion was supplanted by Judge Lacey's implementation of what he erroneously believed to be the sole mandate of Rule 23(b). We simply find no merit to appellants' contention.

> of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.
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> **Fed. R. Crim. Pro. 23(b).**

[13] Rule 23(b) makes no provision for the substitution of alternate jurors. Juror substitution is authorized and governed by the provision of Rule 24(c) of the Federal Rules of Criminal Procedure which provides in pertinent part:

> (c) **Alternate Jurors.** The court may direct that not more than 6 jurors in addition to the regular jury to be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Fed. R. Crim. Pro. 24(c). Although 24(c) requires that alternate jurors be discharged once the jury retires for deliberations, Judge Lacey had retained and sequestered two alternates who remained available at the time the disqualified juror was dismissed. *See* discussion *infra*.

Prior to August 1, 1983, Rule 23(b) required the stipulation of counsel in order to proceed with an eleven-person jury. Meanwhile, Federal Rule of Criminal Procedure 24(c)[14] required that all alternate jurors be excused at the time the case was submitted to the jury for deliberation. Thus, the interaction between Rules 23(b) and 24(c) enabled defendants to force a mistrial if a juror became incapacitated during deliberations, for absent stipulation the court could not proceed with a jury of eleven and post-submission substitution was barred by 24(c). As a result, particularly after lengthy trials, some judges took the precaution of retaining alternates, in clear violation of 24(c), in order to avoid mistrial if counsel refused to proceed with a jury of eleven after a juror became incapacitated during deliberations. Appellate courts reviewing this problem invariably held that a departure from the plain language of Rule 24(c) would not automatically constitute reversible error; rather, the verdict would be sustained absent a showing of prejudice to defendant. *See, e.g., United States v. Hillard*, 701 F.2d 1052, 1058 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983); *United States v. Kopituk*, 690 F.2d 1289, 1309-11 (11th Cir. 1982), *cert. denied sub. nom., Turner v. United States*, 461 U.S. 928 (1983); *United States v. Phillips*, 664 F.2d 971, 994-96 (5th Cir. 1981), *cert. denied sub. nom., Meinster v. United States*, 457 U.S. 1136 (1982). In so doing, however, these courts refused to endorse violations of Rule 24(c) as a matter of course. The Eleventh Circuit in *Kopituk, supra*, noted:

> It is not our intention, nor is it within our province, to authorize routine deviation from the terms of Rule 24(c). That rule is 'the rule' and the substituted juror procedure upheld herein is a narrowly limited exception to the rule, applicable only in extraordinary situations and, even then, only

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[14] *See supra* note 13.

> when extraordinary precautions are taken . . . to ensure that the defendants are not prejudiced.

Kopituk, 690 F.2d at 1311.

We begin our analysis of procedures employed by Judge Lacey, then, with the observation that the initial decision by the district court to retain and sequester two alternate jurors once the case had been submitted to the jury was a clear violatioon of Rule 24(c). *Accord Phillips*, 664 F.2d at 994. The unique position advanced on this appeal, however, does not allege error in the violation of Rule 24(c). Instead, appellants, in effect, challenge the failure of the district judge to violate (or at a minimum, seriously consider violating) the rule *in toto*. Appellants' proposition is absurd.

When the Advisory Committee on the Federal Rules of Criminal Procedure studied the interaction between Rules 23(b) and 24(c) and, specifically, the stumbling block imposed by the stipulation requirement, it explicitly rejected the proposed solution of amending Rule 24(c) to permit substitution.[15] The Committee's aversion to the juror-substitution option is beyond doubt. The Committee noted:

> There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on the Criminal Rules doubts as to the desirability and constitutionality

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[15] For a review of the rejected proposed rule permitting juror substitution following the commencement of jury deliberations, see Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289, 341-45 (1981).

> of such a procedure. These doubts are as forceful now as they were a quarter century ago. To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Advisory Committee Note, 97 F.R.D. 245, 300 (1983) (quoting Wright, Federal Practice and Procedure § 388 (1969)). Instead, the Committee concluded that the better alternative was to amend 23(b) to permit the judge, on his own motion, to proceed with a jury of eleven. The amendment was thus designed to avert the dilemma posed by the very cases on which appellants now rely, *e.g., Phillips, supra.*

Although the primary objective of the amendment to Rule 23(b) is to provide judges with an alternative to mistrial after a juror is excused for cause, the amendment also contemplates compliance with Rule 24(c). Because the amendment does not allow the court, on its own motion, to proceed with a panel of *less* than eleven, however, Judge Lacey retained the two alternates as a precaution were he later confronted with the necessity of excusing two jurors for cause.[16] *See United States v. Gambino,* 598 F. Supp. 646, 660 (D.N.J. 1984). That potentiality never materialized and, therefore, Judge Lacey was not forced to journey into unknown territory.

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[16] Judge Lacey's action in anticipation of the dismissal of two jurors is not challenged before this court. Accordingly, we express no opinion as to the propriety or desirability of such action. We note, however, that Judge Lacey's apprehensions were not unfounded. Indeed, it is merely fortuitous that juror number four did not also view the document that necessitated the dismissal of juror number five, or that the document viewed by juror number four was deemed innocuous by the court and counsel. *See* United States v. Gambino, 598 F. Supp. at 658.

He was instead faced with a set of circumstances for which a solution had been devised, *viz.* Rule 23(b), a solution which appellants urge us to ignore. We refuse to do so. It is clear from the record that the district court did not abuse its discretion under Rule 23(b) in opting for the eleven-panel verdict. It is equally clear that under Rule 23(b) Judge Lacey did all that he was required to do. "The [Rule] provides that if a juror is excused after the jury has retired to consider its verdict, *it is within the discretion of the court whether to declare mistrial or to permit deliberations to continue with 11 jurors.*" 97 F.R.D. at 301 (emphasis added). The court was under no obligation to consider the feasibility of any other options, particularly one which was explicitly disfavored as a remedial device by the Rules Committee that studied and revised Rule 23(b).

V.

CONFLICT OF INTEREST

Rosario Gambino alleges that his sixth amendment right to effective assistance of counsel was violated because his trial lawyer's performance was adversely affected by a conflict of interest. The factual predicate of this claim rests upon the simultaneous representation of Rosario Gambino and Gaetano Mazzara by defense attorney, Jacob Evseroff. While representing Rosario at the trial level in the instant action, Mr. Evseroff had also been retained as counsel for Gaetano Mazzara in *United States v. Badalamenti, et al.*, No. 84-Cr-286, a narcotics conspiracy case pending in the United States District Court for the Southern District of New York. Documents filed in connection with the prosecution's case in *Badalamenti* indicated that Mazzara was also under suspicion as the source of the heroin sold to undercover agents by Anthony Spatola and Antonio Gambino on January 18,

1984. Rosario Gambino argues that Mr. Evseroff's dual representation created an actual conflict of interest because "for Mr. Evseroff to demonstrate that it was not Rosario Gambino, but Mazzara, who supplied the heroin would breach his duty of loyalty to Mazzara. Thus counsel's fidelity to Rosario Gambino -- including inculpating Mazzara to exculpate Gambino -- clashed with his allegiance to Mazzara." Brief of Rosario Gambino at 24-25.

A.

A litany of cases in this circuit firmly establish our general policy against entertaining ineffective assistance of counsel claims on direct appeal, *see e.g., Government of the Virgin Islands v. George*, 741 F.2d 643, 646 (3d Cir. 1984); *United States v. Davis*, 710 F.2d 104, 110 (3d Cir. 1983); *United States v. Frankenberry*, 696 F.2d 239, 241-42 (3d Cir. 1982); *United States v. Sturm*, 671 F.2d 749, 750-51 (3d Cir. 1982) (per curiam), *cert. denied*, 103 S. Ct. 95 (1985); *United States v. Jackson*, 649 F.2d 967, 973 (3d Cir.), *cert. denied*, 454 U.S. 871, 1034 (1981); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743-744 (3d Cir. 1979); *United States v. Garcia*, 544 F.2d 681, 684 n.1 (3d Cir. 1976). The rationale underlying this preferred policy is that oft-times such claims involve allegations and evidence that are either absent from or not readily apparent on the record. Thus, we have maintained that the better course is for the accused to pursue his objections in an appropriate collateral proceeding, *see e.g.*, 28 U.S.C. § 2255, where the district court may compile a sufficient factual record thereby facilitating appellate review.

Recently, in *Government of the Virgin Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984), this court had occasion to carve out a narrow exception to the general rule against hearing ineffective assistance of counsel claims

on direct appeal. Therein we held that "where an objection has been properly made at trial, or, where the record clearly shows actual conflict of interest and objections made at trial did or should have put the trial court on notice that potential conflict of interest existed, this court's 'preference' for developing such issues on collateral attack need not be followed, and a full consideration of the issue is appropriate." *Zepp*, 748 F.2d at 134. In arriving at this conclusion, we observed the teachings of two contemporaneous United States Supreme Court decisions.

In *United States v. Cronic*, 104 S. Ct. 2039 (1984) and *Strickland v. Washington*, 104 S. Ct. 2052 (1984), the Supreme Court was asked to determine the proper standards for judging sixth amendment claims of ineffective assistance of counsel. Claims of ineffective assistance of counsel may be broadly categorized into two groups: (1) those claims primarily founded upon external factors, [17] and (2) those founded upon the actual conduct or misconduct of the trial lawyer. Moreover, as observed in *Strickland* and *Cronic*, claims that involve allegations

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[17] In *Cronic* the Supreme Court acknowledged ineffective assistance claims "based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused." *Strickland*, 104 S. Ct. at 2062 (citing *Cronic*, 104 S. Ct. at 2047-48). Such claims contemplate particularly egregious circumstances such as where the defendant is denied the assistance of counsel at a critical stage of the litigation prosecution. *Cronic*, 104 S. Ct. at 2047 & n.25, or where external interference prevents even the most able lawyer from providing meaningful assistance, *see Cronic*, 104 S. Ct. 2047-48 (citing Powell v. Alabama, 287 U.S. 45 (1932)). The Court concluded that "when surrounding circumstances justify a presumption of ineffectiveness . . . a Sixth Amendment claim [may] be sufficient without inquiry into counsel's actual performance at trial." *Cronic*, 104 S. Ct. at 2048.

of attorney misconduct may be further divided into (1) those premised on the incompetence of counsel due to specific errors or omissions during the course of representation, *Cronic*, 104 S. Ct. at 2046 n.20; *Strickland*, 104 S. Ct. at 2064-69; or (2) those premised on an actual conflict of interest that adversely affected counsel's performance; *Cuyler v. Sullivan*, 446 U.S. 335, 348; *Strickland*, 104 S. Ct. at 2067. Under the first type of claim, where an ineffective assistance claim alleges deficient performance by trial counsel, the Court instructed that a defendant must "affirmatively prove prejudice." *Strickland*, 104 S. Ct. at 2067. Upon addressing the burden to be borne by an accused advancing an ineffective assistance of counsel claim due to an actual conflict of interest, however, the *Strickland* Court reiterated its prior pronouncement, announced in *Cuyler v. Sullivan*, that an actual conflict of interest warrants a *presumption* of prejudice. *See Strickland*, 104 S. Ct. at 2067.

It is important to note that overemphasis on the presumption of prejudice cannot operate to obviate the requisite obligation to demonstrate the existence of an actual conflict. "Prejudice is presumed *only* if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 104 S. Ct. at 2067 (quoting *Cuyler v. Sullivan*, 446 U.S. at 350, 348) (emphasis added). Thus, the less stringent test to obtain relief under the sixth amendment for conflicts of interest does not give rise to a less stringent standard in determining whether such claims should be resolved on direct appeal. As we stated in *Zepp*, the desirability of leaving to the district court, in the first instance, the development of an appropriate factual record, whether through an evidentiary hearing or in the course of a habeas corpus collateral proceeding, is equally applicable to claims of ineffective assistance of counsel based on a conflict of interest as to those

based on trial counsel's incompetence. *See Zepp,* 748 F.2d at 133. The critical inquiry on this direct appeal, then, is whether the record evidence demonstrates that Jacob Evseroff "actively represented conflicting interests."

B.

"Actual conflict of interest is evidenced if, during the course of representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action. . . . This conflict must cause some lapse in representation contrary to the defendant's interests but such lapse need not rise to the level of actual prejudice." *Sullivan v. Cuyler,* 723 F.2d at 1077, 1086 (3d Cir. 1983) (*Sullivan II*).

Following trial in this matter, appellant Rosario Gambino filed a Rule 33 motion for a new trial. Fed. R. Crim. Pro. 33. Relying on various statements contained in government pleadings filed in the *Badalamenti* narcotics case, Rosario Gambino argued *inter alia,* that those "documents conclusively demonstrate that prior to Rosario Gambino's trial the government was in possession of evidence which it contended demonstrated that Spatola and Bosco obtained the heroin [for the January 18, 1984 transaction] not from Rosario Gambino but instead from Castronovo and Mazzara or through their agent, Joseph LaRosa." App. 65a. Accordingly, Rosario Gambino requested that Judge Lacey order a new trial on the ground of newly discovered evidence.[18]

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[18] Rosario Gambino alleges reversible error in the district court's denial of his motion for a new trial. After reviewing the record and the claims of appellant, we do not find that the trial judge improperly denied Gambino's motion for a new trial.

Our review of the record on the Rule 33 motion reveals that, though not specifically raising a claim of ineffective assistance of counsel, Rosario, through newly acquired counsel, twice alluded to a potential conflict of interest in memorandum filed in support of his motion.[19] First, in the course of responding to the government's position that documents and the information contained therein were not newly discovered evidence, Rosario argued that "[s]urely, the government could not expect Rosario Gambino's attorney to contend that his other client, Gaetano Mazzara, might have supplied the heroin, especially in view of the total lack of any such claim by the government at the Gambino trial." App. 84a-85a. Then, in response to the government's contention that the *Badalamenti* documents could have been discovered through due diligence of trial counsel, Rosario Gambino's memorandum again observed the potential conflict: "Surely [Mr. Evseroff] cannot be considered to be less than diligent for failing to review documents in a wholly separate case to see whether those documents might impact upon Rosario Gambino's trial. This is especially true when the government did not in any way indicate to him that it knew that the case might be interrelated and

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[19] We acknowledge that the positive record evidence relied on by appellant as demonstrative of an actual conflict consists exclusively of documents filed in connection with appellant's Rule 33 motion. The requirement that an objection be properly raised at trial, however, is not a rigid, mechanical rule blind to valid claims properly raised on pre- or post-trial proceedings. *See e.g., Zepp*, 748 F.2d at 134 n.9 (recognizing conflict claims raised during suppression hearing); *Cronic*, 104 S. Ct. at 2051 n.42 (acknowledging that an ineffective assistance claim properly raised and ruled on in a Rule 33 motion for a new trial may be considered on direct appeal); *cf.* American Home Assurance Co. v. Sunshine Supermarket, Inc., 753 F.2d 321, 324-25 (3d Cir. 1985) (objection when evidence of nonprosecution was introduced during hearing on motion *in limine* was not required to preserve for appeal the specific issue raised in the motion).

that he would have a clear and unquestionable conflict of interest between his two clients, Rosario Gambino and Gaetano Mazzara." App. 86a-87a.

Upon ruling on appellant's motion for a new trial, Judge Lacey found that the information regarding Mazzara and Castronovo was contained in documents that were made public well in advance of Rosario Gambino's trial and therefore, was available to the defense in the exercise of due diligence. App. 151a. In addition, Judge Lacey expressly noted that in his capacity as attorney of record for Mazzara in the *Badalamenti* proceeding, Mr. Evseroff had actual possession of the information now labeled as newly discovered. Finally, Judge Lacey concluded that, notwithstanding any constructive notice afforded to counsel, Mr. Evseroff was actually provided with a surveillance log -- J-146 -- of the events of January 17, 1984 at the Caffe Milano during the course of the trial. The judge observed:

> This very exhibit was used carefully and deliberately by Mr. Evseroff in his cross-examination of surveillance agents . . . J-146 contains several log entries naming and noting the observation of Gaetano Mazzara and Francesco Castronovo at the Caffe Milano, consistent of course with what is now so heavily relied upon by the defendant. While Mr. Evseroff and other defense counsel conducted extensive cross-examination of the surveillance agents, not one elected to question the agents about the activities of Gaetano Mazzara and Francesco Castronovo at the Caffe Milano on that date.

App. 151-52a.

At the onset, Rosario Gambino asserts that multiple

representation[20] is clearly established on the record by Mr. Evseroff's undertaking to simultaneously defend, albeit in separate proceedings in federal courts in New Jersey and New York, two clients accused of committing the exact same crime. He then turns to Judge Lacey's findings on the Rule 33 motion and argues that those findings constitute direct record evidence of Mr. Evseroff's conflict of interest.

In addition to his reliance on evidence emanating from the Rule 33 motion, Rosario argues that the actual conflict posed by Mr. Evseroff's dual representation is established by certain omissions noted during the course of the trial: (1) counsel's failure to shift suspicion away from his client by questioning government agents about Mazzara's involvement in the January 18 drug transaction, (2) counsel's failure to investigate and obtain additional witnesses to implicate Mazzara and exonerate Rosario, and (3) counsel's failure to vigorously suggest to the jury during summation that Mazzara was the supplier of the heroin. The failure to advance such a defense, Rosario contends, is tantamount to a serious lapse in representation that clearly indicates that Mr. Evseroff labored under an actual conflict of interest that adversely affected his performance. Finally, Rosario points to Mr.

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[20] In *Sullivan II* we noted that a conflict of interest violative of the sixth amendment is established upon proof of (1) multiple representation that, (2) creates an actual conflict of interest that (3) results in an adverse effect upon the lawyer's performance. 723 F.2d at 1084. We subsequently acknowledged in *Zepp* that "our decision [in *Sullivan II*] must not be construed so narrowly as to encompass only those factual situations where counsel simultaneously represents different defendants." 748 F.2d at 135. Thus, traditional multiple representation remains a salient, though non-essential, element of a cognizable conflict of interest claim. Rosario alleges multiple representation in the defense of two clients not defendants in the same trial. Our key consideration remains whether trial counsel "actively represented conflicting interests." *Cuyler*, 446 U.S. at 350.

Evseroff's failure to alert the trial judge of counsel's dual representation of Mazzara prior to trial, or at the earliest point during trial after which the conflict became apparent, as an impermissible lapse in representation.[21] Thus, Rosario Gambino concludes that the record before this court is adequate to review his ineffective assistance of counsel claim on direct appeal.

In response, however, the government argues that Rosario's claim reveals neither an actual conflict of interest nor one that adversely affected trial counsel's

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[21] In addition to the argument that Mr. Evseroff's failure to inform the district court of his dual representation is proof of actual conflict, Rosario Gambino asserts that his own ignorance of the existence and implications of Mr. Evseroff's dual representation "raises the question of whether [Rosario] even needs to demonstrate that an actual conflict of interest adversely affected counsel's performance." Brief of Rosario Gambino, at 30 n.*. Whatever the merits of this position to a substantive resolution of Rosario's claim, it has no bearing on our determination whether such substantive resolution is warranted on direct appeal. *Cf.* Briguglio v. United States, 675 F.2d 81, 82 (3d Cir. 1982) (affirming defendant's conviction without prejudice to his right to pursue claims in a collateral proceeding despite defendant's ignorance during trial of criminal investigation of his trial attorney by the same United States Attorney's Office prosecuting the case against accused).

In *Cuyler v. Sullivan* the Supreme Court acknowledged that "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." The Court proceeded to note, however, that "[a]bsent special circumstances, . . . *trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.*" 446 U.S. at 346-47 (emphasis added). We think that the highlighted segment of the *Cuyler* quote is suggestive of but a few of the possibilities on which this record is silent. Absent direct evidence, we will not assume, for the sake of addressing Rosario Gambino's sixth amendment claim, that there was an actual conflict, or that counsel and clients did not "knowingly accept such risk of conflict as may exist." These issues are better explored in a § 2255 proceeding.

performance. Instead, the government describes the claim as one "based totally on speculation and hypothetical analysis." Having extensively reviewed and outlined the evidence on the alleged conflict of interest, we think that it is far from manifest that an actual conflict existed. While the evidence strongly indicates that there *may* have been a conflict, "a possible conflict inheres in almost every instance of multiple representation." *Cuyler*, 446 U.S. at 348. Both parties have advanced various, plausible interpretations of the trial strategy employed by Mr. Evseroff at Rosario Gambino's trial. Consequently, we cannot approach this record with the sanguinity envisioned by *Zepp*. The narrow exception enunciated in *Zepp* is tailored to fit only those exceptional situations that lend themselves to only one conclusion --that trial counsel labored under an actual conflict of interest. Our past precedent compel us to affirm the conviction of appellant Rosario Gambino without prejudice to his ability to initiate a § 2255 collateral proceeding for the resolution of his conflict of interest claim.

VI.

SENTENCING

Appellants urge us on various prudential and constitutional grounds to vacate their sentences and remand for resentencing. We find no merit in those arguments. Thus, absent a procedural defect or a clear abuse of discretion, we will not interfere with a sentence imposed within the statutory limits afforded to the trial judge. *See United States v. Matthews*, 773 F.2d 48, 52 (3d Cir. 1985). We find evidence of neither. Accordingly, the sentences imposed by the district court shall be affirmed.

A True Copy:

Teste: *Clerk of the United States Court of Appeals for the Third Circuit*

Appendix B
Order of United States Court of Appeals

May 21, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5843 ONLY

UNITED STATES OF AMERICA

vs.

GAMBINO, ERASMO,
Appellant

Present: WEIS, HIGGINBOTHAM and BECKER,
Circuit Judges

1. Motion by Appellant Pro Se to stay the mandate pending remand to trial court which the Court may wish to treat as a motion to recall the mandate.
2. For your information the opinion was filed and judgment entered on April 18, 1986. This Court's mandate issued in this matter on May 12, 1986.

in the above-entitled case. No Answer has been received to the above motion.

Respectfully,

/s/ _____
Deputy Clerk
Direct Dial - 597-3136

The foregoing Motion is denied.

By the Court,

s/s _____
A. Leon Higginbotham
Circuit Judge

Dated: 5/27/86

Appendix C
Opinion of United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

ROSARIO GAMBINO, ERASMO GAMBINO, ANTHONY SPATOLA, ANTONIO GAMBINO and MARIO GAMBINO,

Defendants.

Crim No. 84-98

Nov. 19, 1984

In prosecution on charges arising from a drug conspiracy, the District Court, Lacey, J., held that: (1) Government proved drug conspiracy by the preponderance of evidence and also proved the membership therein of each of the defendants, and (2) where juror was removed for "just cause" after deliberations had commenced, district court did not err in proceeding with 11 jurors rather than declaring a mistrial or substituting an alternate.

Ordered in accordance with opinion.

W. HUNT DUMONT,
U.S. Attorney,
by Marianne Espinosa Murphy &
Edward J. Bilinkas, Asst. U.S. Attys.
Newark, N.J.,
For the Government

JACOB R. EVSEROFF
Brooklyn, N.Y.
For Defendant Rosario Gambino

RONALD P. FISCHETTI
New York City, N.Y.
For Defendant Erasmo Gambino

ADOLPH GALLUCCIO
Paterson, N.J.
For Defendant Anthony Spatola

IRA FRIEDMAN
New York City, N.Y.
For Defendant Antonio Gambino

CHARLES CARNESI
Brooklyn, N.Y.
For Defendant Mario Gambino

OPINION

LACEY, District Judge

During the trial of this matter certain evidence rulings were made. The following sets forth the bases of those rulings.

THERE IS AMPLE INDEPENDENT EVIDENCE AS TO THE MEMBERSHIP OF EACH DEFENDANT IN THE CONSPIRACY CHARGED

[1] The proper standard to be applied by the court in determining whether co-conspirator statements may be submitted to the jury is whether the Government has established the existence of the alleged conspiracy, the membership of each defendant with it by a "fair preponderance of the independent evidence," and that such statements were made during the conspiracy and in furtherance of it. *United States v. Trotter*, 529 F.2d 806, 811 (3rd Cir. 1976). *See also United States v. DiPasquale*, 740 F.2d 1282 (3rd Cir. 1984); *United States v. Gibbs*, 739 F.2d 838 (3rd Cir. 1984) (en banc); *United States v. Ammar*, 714 F.2d 238, 247 (3rd Cir. 1983); *United States v. Continental Group*, 603 F.2d 444, 457 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed. 2d 668 (1980); *United States v. Trowery*, 542 F.2d 623 (3rd Cir.

1976), *cert. denied,* 429 U.S. 1104, 97 S.Ct. 1132, 51 L.Ed. 2d 555 (1977).

[2] This standard of proof with respect to each defendant has been met by the United States, both at the end of the Government's case and at the end of all the evidence.

Rosario Gambino

On January 17, 1984, the defendants, Rosario Gambino, Anthony Spatola, and Giovanni Bosco, met at the Caffe Milano in Brooklyn, New York, and stayed there on and off until approximately 1 a.m. on January 18, 1984, for the purpose of obtaining heroin to sell to undercover agents at approximately 4 a.m. on January 18, 1984 (8 Tr. 1447-49, 9 Tr. 1609-12).[1]

Approximately 13 minutes after Anthony Spatola's arrival at the Caffe Milano, a Mercedes Benz bearing New Jersey registration 228-VIF was observed leaving the curb in front of the Caffe Milano[2] (8 Tr. 1448).

In an intercepted conversation later that day, Anthony Spatola indicated that the heroin would arrive at the Caffe Milano between 11 and 11:30 p.m. (Exhibit 138b). At approximately 11:19 p.m. the Mercedes Benz was again observed at the Caffe Milano, and at 11:29 p.m., it was observed departing. (9 Tr. 1610-1611).

Although this vehicle is registered to Anna Zella, 512 Haddonfield Road, Cherry Hill, New Jersey, the address given for Zella is actually the address of a defunct night club, Valentino's. (10 Tr. 1853-54). The driver's license and insurance policy listed on the registration are false (Exhibit 6d 10 Tr. 1963). This automobile was observed at the residence of Rosario Gambino, and used by him frequently during the course of the investigation. (9 Tr. 1581-82, 10 Tr. 1855).

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[1] Transcript citations are to the volume number and page. E.g., 8 Tr. 1447 refers to Volume 8, p. 1447 of the transcript.

[2] Testimony was offered through a Carlo Filiberto that he borrowed the car from Rosario Gambino. He was not a credible witness.

The defendants, Giovanni Bosco, Anthony Spatola and Antonio Gambino, rented Room 311 at the Caesar's Boardwalk Regency Hotel for the heroin sale on January 18, 1984. (Exhibit 8a). It was in this room that Special Agent Clagg tested and received the heroin purchased that day. (9 Tr. 1729). There was only one telephone call billed to this room during the time the defendants rented it. Approximately 20 minutes prior to the defendants' check out, a call was placed to the residence of Rosario Gambino. (Exhibit 8c). Upon leaving the hotel, Bosco, Spatola and Antonio Gambino drove directly to Rosario Gambino's residence in Cherry Hill, New Jersey. (8 Tr. 1343-46, 10 Tr. 1857). Prior to their arrival, at 9:30 p.m. the only vehicle parked in the Rosario Gambino residence was the above-described Mercedes Benz, N-J registration number 228-VIF. (10 Tr. 1852).

At the end of the Government's case, the jury could have inferred, and for 801(d)(2)(E) purpose I find, that this visit was made so that the three, Bosco, Spatola and Antonio Gambino, could report to Rosario Gambino on the success of their mission and to pay him part or all of the money received. On the defendants' case, Rosario Gambino and Anthony Spatola testified about this visit. Their explanation was that it was nothing more than a visit to wish Rosario Gambino well before he entered the hospital later that morning. Their testimony was undercut, however, by evidence consisting of English language transcripts of Sicilian language telephone conversations between Antonio Gambino's wife, and later, between Antonio Gambino and Rosario Gambino. Both calls, fairly read, readily yield the inference that Antonio Gambino was not aware of the fact that Rosario Gambino was going to be hospitalized; therefore, the defendants' version of the purpose of the visit by Bosco, Spatola and Antonio Gambino to Rosario Gambino's home was discredited.

On January 30, 1984, Special Agent Glass spoke to Antonio Gambino at approximately 4:20 p.m. Pursuant to ongoing heroin negotations, Antonio Gambino advised

Special Agent Glass that a half kilogram of heroin would be available for sale on the following day. They agreed to meet that evening at 9 p.m. to discuss the deal further. (4 Tr. 548).

At approximately 6:29 p.m. on that date the toll records for Rosario Gambino's residence telephone reflect a call to the Caffe Milano in Brooklyn (Exhibit 201). At approximately 7:25 p.m., Anthony Spatola called Rosario Gambino pursuant to Gambino's request. In that conversation, Rosario Gambino stated, "I called over there . . . and there's a half (unintelligible) empty for tomorrow." He advised Spatola, "within this week," that there was a "white leaf" for tomorrow but that "if there should be," he would call Spatola. (Exhibit 160b).

Immediately after this telephone conversation, calls were intercepted from Anthony Spatola to co-conspirators Antonio Gambino and Giovanni Bosco. (Exhibits 161b, 162b). That evening when the undercover agents met with Antonio Gambino and Anthony Spatola, they were advised that despite Antonio Gambino's assurance at 4:20 p.m. that afternoon, the heroin would not be definitely available on Thursday. (4 Tr. 571). The information given to the agents at this time as to the availability of heroin was substantially a repetition of the information conveyed by Rosario Gambino to Anthony Spatola in Exhibit 160b.

On February 20, 1984, undercover agents purchased a second half kilogram of heroin from Antonio Gambino and Anthony Spatola for $120,000. (Exhibit 174b). Copies of the actual bills used to purchase this heroin were made and maintained. (5 Tr. 697). Following the sale, defendant Anthony Spatola telephoned Giovanni Bosco at the Spatola residence at approximately 7:35 p.m. (Exhibit 175b). At approximately 7:49 p.m., an incoming telephone call from Giovanni Bosco was intercepted over Rosario Gambino's telephone. In this call, Bosco was advised by Rosario Gambino's wife that Gambino had instructed her to tell Bosco that, as the Government

argues, and I find, he could see Rosario Gambino at the Caffe Milano on the following day. (Exhibit 176b). Giovanni Bosco was observed on the following day at the Caffe Milano. (8 Tr. 1529-30).

On the date of his arrest, March 16, 1984, Rosario Gambino's residence was searched pursuant to a search warrant. Two of the $100 dollar bills used to purchase heroin on February 20, 1984, in this case were recovered.

Erasmo Gambino

Immediately after Special Agent Glass telephoned Antonio Gambino on December 30, 1983, to inform him that he was authorized to negotiate the purchase of one kilogram of heroin, concentrated efforts were made by Anthony Spatola to reach Erasmo Gambino (Exhibits 105b-110b). In a call intercepted on January 2, 1984, Antonio Gambino asked to meet with Erasmo Gambino and there was the following exchange:

"ERASMO GAMBINO: Tell me something, is this to waste time or not?
ANTONIO GAMBINO: Not to waste time!
ERASMO GAMBINO: Not to waste time?
ANTONIO GAMBINO: No! We can marry this girl.
ERASMO GAMBINO: She can be married?
ANTONIO GAMBINO: Yes!
ERASMO GAMBINO: Did he like her?
ANTONIO GAMBINO: Yes. He like her but, we have to talk.
ERASMO GAMBINO: I understand.
ANTONIO GAMBINO: It can be done!
ERASMO GAMBINO: But she's tasty, she's never been out with anyone else.
ANTONIO GAMBINO: I know, but you know how it is, they always have something to say, like they say her mouth is too big. They always have something to say, you know women are?"

Later, in the same conversation, there was a reference to when "we" get married. (Exhibit 111b). In light of the subsequent use of the marriage code between Special Agent Glass and Antonio Gambino (Exhibit 115b), and the substance of Special Agent Glass' call on December 30, 1983 (Exhibit 140b), I find that Antonio Gambino was using the marriage code (Exhibit 111b) to inform Erasmo Gambino of the status of his heroin negotiations with Special Agent Glass. In this same conversation, a meeting was arranged for following day. On January 3, 1984, Erasmo Gambino was observed meeting with Anthony Spatola at the Playboy Casino Hotel in Atlantic City. During their meeting, Erasmo Gambino used a public telephone in the lobby, on one occasion placing a call to the Caffe Milano in Brooklyn (Exhibit 2, 8 Tr. 1332), the place later visited by Anthony Spatola to obtain the heroin for the January 18, 1984 sale. (8 Tr. 1447-49, 9 Tr. 1609-12).

On January 13, 1984, Special Agent Glass telephoned Antonio Gambino to advise him that he would return to the Atlantic City area on Monday, January 16, 1984, with the money and everyone necessary for the heroin deal and that the deal could then take place on Tuesday, January 17, 1984 (Exhibit 115b). In this conversation, Antonio Gambino instructed Special Agent Glass in the use of a "new language" which employed codes. Specifically, he used phrases relating to buying a car and marrying a girl as codes for the sale of heroin. Immediately after this conversation, Antonio Gambino called Anthony Spatola and conveyed to him the information he had just received from Special Agent Glass by using the marriage code he had just instructed Special Agent Glass to use. (Exhibit 116b). Anthony Spatola, in turn, called Erasmo Gambino on the same day. Employing the same marriage code as had been used in Exhibits 115b and 116b, Erasmo Gambino and Anthony Spatola discussed Spatola's request to have "this mariage on Tuesday," including his need to "pickup the fiance" on Monday for his "appointment with a father-in-law on

Tuesday." (Exhibit 117b). The relationship between Spatola's conversation with Erasmo Gambino in Exhibit 117b and the conversation between Antonio Gambino and Special Agent Glass in Exhibit 115 is obvious.

There was another significant series of telephone calls involving Erasmo Gambino during the course of the preparations for the heroin sale on January 18, 1984. On January 16, 1984, Special Agent Glass spurned Antonio Gambino's offer to do the deal that Thursday, (January 19, 1984) and insisted that the deal be concluded on Tuesday (Exhibit 118b). Immediately after this conversation, Antonio Gambino and Anthony Spatola had a conversation in which they discussed the fact that Special Agent Glass was unwilling to wait until Thursday. In this conversation, Antonio Gambino and Anthony Spatola also discussed necessary steps to take to be able to sell the heroin on the next day, which steps included getting in touch with a certain individual. (Exhibit 119b). Thereafter on that day, Anthony Spatola called the Caffe Milano at 10:43 p.m. (Exhibit 124b) and at 11:51 p.m. (Exhibit 126b) and Erasmo Gambino's residence (Exhibit 125b) asking for "Erasmo." Shortly after midnight, Erasmo Gambino placed a collect call to Anthony Spatola in response to Spatola's efforts to contact him. Spatola told Erasmo Gambino, "I must see you! . . . and early!" When Gambino stated, "it's not like I have it in my pocket . . . ," Spatola replied, "then everything is spoiled," adding, "listen to me, we have everything ready . . . everything!" Erasmo Gambino promised to call back in 20 minutes and Spatola implored him, "please, Erasmo, do me this favor?" (Exhibit 128b).

Immediately after this call, Spatola called Antonio Gambino, discussing this call and whether the "quail could be flown." (Exhibit 129b).

Erasmo Gambino called Spatola back as promised. He said that there was "no pizzaiolo for tomorrow," but assured Spatola, "they guaranteed some for around Wednesday or Thursday, for sure." Spatola objected that

"the fiance was already here!" When asked for an "exact date," Erasmo Gambino replied, "Thursday." (Exhibit 130b). As was the case with the earlier call, Spatola immediately called Antonio Gambino after this call and discussed the proposed sale of heroin to Special Agent Gambino, making reference to the fact that Special Agent Glass was to call Antonio Gambino at 10:30 a.m. (Exhibit 131b).

When Special Agent Glass called Antonio Gambino the next morning at approximately 10:37 a.m., Antonio Gambino told him that the "champagne" would be ready Thursday (Exhibit 132b), the "exact date" provided by Erasmo Gambino in Exhibit 130b.

The first meeting between Special Agent Glass and Antonio Gambino after the January 18, 1984, heroin sale was on January 20, 1984. At this meeting, Antonio Gambino told Special Agent Glass that there were three kilograms of heroin available. Special Agent Glass replied that he would have to get back to Antonio Gambino at the beginning of the next week after speaking to his boss and learning whether he was satisfied with the quality of the heroin just purchased. (3 Tr. 384, 392). On the same day, Antonio Gambino had a telephone conversation with Erasmo Gambino in which Antonio Gambino stated, "I spoke with him today . . . . and he told me, it's because he has to speak to that guy—the other guy, no? . . . and he stated that by Tuesday he'll have an answer for me." Antonio Gambino then asked to call Erasmo Gambino from an "outside phone" so that he could speak more freely. (Exhibit 145b). Anthony Spatola and Antonio Gambino had yet another conversation with Erasmo Gambino on Sunday, January 22, 1984, in which Antonio Gambino stated that he would have an answer on Tuesday, that "on Tuesday he's going to tell me precisely when and how we're going to marry these youngsters." (Exhibit 148b).

On January 24, 1984, Special Agent Glass met with Antonio Gambino and Anthony Spatola as planned.

This meeting was followed by a call from Spatola to Erasmo Gambino later in the day. (Exhibit 150b).

On January 26, 1984, there were highly publicized heroin arrests in Philadelphia which Special Agent Glass called to the attention of Antonio Gambino and Anthony Spatola on January 27, 1984. (Exhibit 13, 3 Tr. 496). Thereafter, the course of negotiations was altered. The most dramatic development arose in the meeting of February 2, 1984 at Caesar's Boardwalk Regency. In a meeting on January 30, 1984, the undercover agents had been told that heroin would be available for sale on Thursday, February 2, 1984. At this meeting, however, the undercover agents were advised that the people providing the heroin were very concerned by the arrests in Philadelphia and were now very cautious. (4 Tr. 577). Prior to this meeting Anthony Spatola and Giovanni Bosco were observed with Erasmo Gambino at the Caffe Milano in Brooklyn. (Exhibit 504, 11 Tr. 2058-59).

Thereafter, Antonio Gambino advised Special Agent Glass that there would be no more heroin sales until he and Anthony Spatola visited Special Agent Short in California to learn more about him. (4 Tr. 583). On February 14, 1984, Special Agent Glass agreed to this trip but asked that Giovanni Bosco come along. (4 Tr. 587). On February 16, 1984, Antonio Gambino called Special Agent Glass and told him that Giovanni Bosco would be accompanying them to California. (4 Tr. 599). On February 17, 1984, Anthony Spatola and Antonio Gambino were observed going to Philadelphia to meet with Erasmo Gambino. (8 Tr. 1434-35). That evening, Antonio Gambino telephoned Special Agent Glass to inform him that heroin was available for a sale prior to the California trip. (4 Tr. 610). On February 20, 1984, Special Agent Glass and Special Agent Clagg purchased an additional half kilogram of heroin from Anthony Spatola and Antonio Gambino (Exhibit 174b).

Anthony Spatola

Immediately after Special Agent Glass called Antonio Gambino at Figero's Pizzeria Number 2 on December 30, 1983, to advise him that he was authorized to negotiate the purchase of one kilogram of heroin, it was Anthony Spatola who made the persistent calls to reach Erasmo Gambino (Exhibits 105b-110b). When a meeting with Erasmo Gambino was arranged to discuss the planned "marriage," it was Anthony Spatola who met with Erasmo Gambino at the Playboy Hotel on January 3, 1984. (8 Tr. 1331-38, 1425).

On the following evening, Spatola was introduced to Special Agent Glass as "John, the boss from out of state," in a meeting exclusively devoted to discussing how the proposed heroin sale would take place. It was required that Special Agent Glass wear a bathing suit and meet with Spatola in the whirlpool so that Spatola and Antonio Gambino could be assured that he was not recording the meeting. (2 Tr. 164).

Thereafter, Spatola was involved in a number of conversations relating to the heroin transactions with Special Agent Glass and with his co-conspirators (Exhibits 114b, 116b-119b, 121b-131b, 133b-138b, 142b, 144b, 146b-147b, 159b-162b, 164b-166b, 168b, 169b, 171b-175b). These conversations and the observations of surveillance agents reveal that Anthony Spatola made numerous efforts to contact Rosario Gambino and Erasmo Gambino to either obtain approval for pending negotiations or to obtain heroin for the sales to the undercover agents and that he further drove the heroin from the Caffe Milano to Caesar's Boardwalk Regency Hotel for the sale on January 18, 1984. (8 Tr. 1447-49, 9 Tr. 1609-12). Along with Antonio Gambino, he was present for the actual heroin sales on January 18, 1984 (Exhibit 143b) and on February 20, 1984, (Exhibit 174b).

Spatola testified. He admitted his involvement.

Appendix C - Opinion of United States District Court

Antonio Gambino

Antonio Gambino was introduced to Special Agent Glass on October 23, 1983 by a person named "Hank." On that date, Antonio Gambino confirmed the fact that he had access to heroin and indicated that he would see if he could obtain some for Special Agent Glass. (Exhibit 100b). Following this meeting, Antonio Gambino met with Special Agent Glass on a number of occasions for the purpose of selling him cocaine and continuing discussions about the possibility of selling Special Agent Glass heroin. During these meetings, Gambino repeatedly referred to "his people" who would be supplying the heroin to him. (7 Tr. 1100-1104). On December 27, 1983, Antonio Gambino delivered a sample of heroin to Special Agent Glass. (Exhibits 103b, 1 Tr. 102). Thereafter, he engaged in numerous conversations relating to the heroin transactions with Special Agent Glass and with others (Exhibits 104b, 111b-116b, 119b-121b, 127b, 129b, 131b-142b, 144b, 145b, 147b-150b, 153b, 157b, 159b, 161b, 163b, 169b, 178b, 179b), and delivered approximately one half kilogram of heroin to the undercover agents on January 18, 1984, (Exhibit 143b) and on February 20, 1984 (Exhibit 174b). His entrapment claim was unworthy of belief.

Mario Gambino

Antonio Gambino was introduced to Special Agent Glass on October 23, 1983 by a person known as "Hank." In that conversation, (Exhibit 100a and b), Gambino confirmed that he had access to heroin from a source other than his source for cocaine but that such purchases would have to be for substantial quantities. He referred to the danger associated with heroin and asked Hank if he guaranteed Special Agent Glass with his life. He agreed to make further sales of cocaine to Special Agent Glass but stated that he had to proceed carefully as to heroin negotiations, observing that for all he knew, Special Agent Glass could be an FBI agent. (Exhibit 100a and b).

On November 9, 1983, Special Agent Glass and Antonio Gambino met at a McDonald's restaurant in Ocean City, New Jersey, for a sale of cocaine. Prior to this meeting Antonio Gambino had indicated to Special Agent Glass in a telephone conversation that he wanted to discuss something else with him but did not wish to discuss it on the telephone. (6 Tr. 1038). At the meeting Antonio Gambino discussed possible heroin sales with Special Agent Glass. While the meeting was taking place, Mario Gambino was observed sitting in the restaurant conducting countersurveillance. (8 Tr. 1321).

After Special Agent Glass telephoned Antonio Gambino on December 30, 1983, to advise him that the sample of heroin provided was satisfactory and that he had authorization to negotiate to purchase one kilogram of heroin, a number of attempts were made to contact Erasmo Gambino. (Exhibits 104b-110b). In a conversation intercepted on January 2, 1984, (Exhibit 111b), Anthony Spatola and Antonio Gambino had a conversation with Erasmo Gambino in which Antonio Gambino advised Erasmo Gambino that "we can marry this girl." A meeting was arranged for the following evening (Exhibit 111b).

At approximately 6:30 p.m. on January 3, 1984, while Spatola was at the Playboy Hotel waiting to meet Erasmo Gambino, a telephone call was intercepted from Mario Gambino to Antonio Gambino. (Exhibit 112b). Antonio Gambino complained of being cut out of the meeting between Erasmo Gambino and Anthony Spatola and voiced concern at possibly being cut out of the heroin deal itself. Mario Gambino demonstrated his knowledge of the ongoing negotiations in this conversation, offering advice to Antonio Gambino on how to proceed and instructing him to tell his source of supply that he, Mario Gambino, vouched for the buyer so that Antonio Gambino could win approval for his proposed sale to the undercover agent. In this conversation there is also a reference to the countersurveillance conducted by Mario Gambino on November 9, 1983.

Later that evening, Antonio Gambino reported the results of the meeting between Erasmo Gambino and Spatola to Mario Gambino. (Exhibit 113b). Antonio Gambino advised his brother that he had asked for permission to "let . . . Mario in [because] he's already been involved" and was told "for the money, okay, but not to go inside." Mario and Antonio Gambino then had an extensive discussion about the heroin negotiations in which Mario Gambino repeatedly advised Mario Gambino on how to handle the negotiations and cautioned him not "to be in the motel when the deal goes down."

On the evening of January 17, 1984, there were a series of three telephone calls intercepted between Antonio Gambino and Mario Gambino. (Exhibits 139b-141b). The second call at 9:05 p.m. is actually a continuation of the first call at 9:02 p.m. which ended abruptly with Mario Gambino hanging up while Antonio Gambino was talking. In Exhibit 140b, Antonio Gambino informs his brother, "maybe tonight we have to do that job, the one we've talked about." When Mario Gambino indicated that he didn't understand, Antonio Gambino stated, "that one, Mario. The one I talked to you about . . . that guy we know . . . the guy we once met together." Antonio Gambino's explanation is an apparent reference to the fact that Mario Gambino conducted countersurveillance of his meeting with Special Agent Glass on November 9, 1983. Mario Gambino's immediate reply to his brothers statement was to ask "around what time?" And, when told, he answered "okay, we can do it in the morning." He was then advised by Antonio Gambino that he would play no active role in the transaction that evening. In Exhibits 140b and 141b Antonio Gambino and Mario Gambino refer to certain items concealed at Mario Gambino's residence. Aside from gold, there are vague allusions to other items which Antonio Gambino apparently needed in preparation for the pending heroin deal. Among the vague references are mentioned "bullets," and "the one with the projectiles," apparently coded references to firearms and/or ammunition.

Surveillance agents observed Anthony Spatola and Antonio Gambino go to Mario Gambino's residence for brief periods of time on January 17, 1984, prior to Anthony Spatola leaving for New York to obtain the heroin and again on February 20, 1984, prior to the heroin sale. (8 Tr. 1342, 1349-51).

On February 20, 1984, Antonio Gambino and Anthony Spatola sold a second half kilogram of heroin to the undercover agents in this case. That evening following the heroin sale, Antonio Gambino called Mario Gambino, who immediately warned his brother that there were problems; that the telephone at the pizzeria had been tapped. Antonio Gambino told his brother that as a result of a dispute Mario Gambino had had with Anthony Spatola, Antonio Gambino was now unable to argue in his behalf with respect to the money they now had to divide. He also referred to a prior payment of $1000 "they" had given to Mario Gambino. (Exhibit 178b). Approximately one half hour later, Antonio Gambino called Mario Gambino again and told him that he would be giving him $300 and that there would be another $300 for a total of $600 as Mario Gambino's "gift." There was a further discussion of the telephone being tapped. (Exhibit 179b).

As I have earlier noted, the defendants Rosario Gambino and Anthony Spatola testified. It was the impression of this court that Rosario Gambino in part, was not a credible witness. His effort to explain away the early morning visit by Bosco, Spatola and Antonio Gambino to which reference has already been made was undermined by the previously referenced evidence of telephone calls placed by Antonio Gambino to the home of Erasmo Gambino and thereafter to Rosario Gambino in the hospital. He also failed to adequately explain the presence of the two $100 dollar bills which matched bills which had been used by the Government agents to purchase the heroin. His credibility was further undermined by evidence showing the tremendous value placed

by him on his personal property after he, in his testimony, had discussed it in terms of furniture 15 years old and "garden furniture." Thus, the case against him for the purposes of this analysis was, if anything, stronger after he testified than it had been before.

As to Anthony Spatola, his credibility was placed in doubt by his claim that he had been "pressured" by Government agents to join in the heroin transaction. That Spatola readily and rapidly took advantage of the opportunity offered by the agents was apparent. Almost at once, he was playing a key role in obtaining the heroin, to the extent that he quickly subordinated Antonio Gambino's role to his. In making my determination of his credibility under F.R.E. 104(a), I decided from my observations of him on the one hand, and Agent Glass on the other, that Spatola was not telling the truth when he said that Glass had twice visited him at Figero's II to persuade him to participate in the heroin transaction. Again, for the purposes of this analysis, the case against Spatola was, if anything, stronger at the end of the defendants' case than it had been earlier.

I have already commented on the witness Filiberto, called by Rosario Gambino to testify that he, Filiberto, had on a critical day to this case, borrowed Rosario Gambino's automobile to drive it to Brooklyn to buy supplies for his pizzeria. On its face the contention is ludicrous. The pizzeria is located in Philadelphia. Yet Filiberto would have us believe that he had to go to Brooklyn to buy supplies because none were available in Philadelphia. Discrediting the reason for the trip to Brooklyn is to discredit the testimony.

Also called by the defendant Rosario Gambino was Agent Lynch. Lynch was called in an effort to explain away the presence of the two $100 dollar bills in Rosario Gambino's bedroom, which tied him to the receipt of money earlier paid by federal agents to Spatola and Antonio Gambino for the heroin. This effort failed.

In conclusion, I find that the Government proved by a preponderance of the evidence the conspiracy charged; by independent evidence, membership therein of each of the defendants; and that the statements alleged to be hearsay were in furtherance of the conspiracy and were made by members of the conspiracy at a time when the defendants against whom they were offered were members of the conspiracy. This was so both at the end of the Government's case and at the end of all the evidence.

THE ALLEGED INCOMPETENCE OF ROSARIO GAMBINO AND ANTONIO GAMBINO

[3] Prior to trial, many days were spent on 18 U.S.C. Section 4244 hearings, brought on by claims of Rosario Gambino and Antonio Gambino that they could not prepare a defense by reason of psychiatric disability. Putting aside the bizarre coincidence of two of five defendants making this contention, I dealt with each on its merits and heard extensive medical testimony.

Opinions were then filed denying motions made by each defendant for his severance and postponement of their trial.

As to Antonio Gambino, the record reflects that, after initially giving his then counsel reason to believe that a defense could not be prepared, this defendant, shortly before trial, dropped this attorney (a Federal Public Defender appointed under the Criminal Justice Act) and retained private counsel. It is clear that new counsel satisfied himself that Antonio Gambino was able to make the decision to drop earlier counsel and retain present counsel. It is also clear that present counsel had no difficulty in preparing a defense of entrapment and presenting it at trial. Moreover, the court saw no indication during trial that this defendant was suffering from any mental disability that prevented him from understanding what was taking place.

As to Rosario Gambino there is more to be said.

After extensive pre-trial testimony, I ultimately determined that this defendant was malingering; and that the symptoms he claimed to be suffering from, and manifesting, were "fake" in order to avoid trial. This conclusion was not easily reached, given the expert testimony the defendant was able to summon to support his claim. Thus he had two psychiatrists, Drs. Berger and Portnow from Bellevue, who testified for him, both of whom had eminent credentials. Yet it was clear to me that the physicians and psychologist called by the United States were telling the truth when they testified that this defendant was attempting a deception—to avoid trial—and that Drs. Berger and Portnow had been deceived.

A six week trial has now been concluded. The difference in this defendant's appearance, manner and bearing throughout the trial, as contrasted with the way he appeared in court during the Section 4244 hearing, has been marked. Because of the earlier proceeding, I have closely observed this defendant through the trial. He has been alert, not slumping, and in frequent whispered conversation with his counsel, and, indeed, with counsel for another defendant, Erasmo Gambino.

The representation made to me before trial that this defendant would not confer with counsel obviously was not accurate once the trial started. Events during the Government's case, requiring, on cross-examination of Government witnesses by this defendant's counsel, that he had information from his client to put the questions, were enlightening. Questions asked on cross-examination in many instances reflected knowledge that could only have come from his client.

Any remaining doubts about this defendant's mental capacity would have been removed, however, by his testimony at trial.[3]

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[3] That the defendant (and his counsel) elected to have defendant testify is persuasive evidence that everything Drs. Berger and Portnow had testified to was totally wrong.

He was not the stumbling, retarded, mentally deficient, psychotic Drs. Berger and Portnow described; he was intelligent, bright, alert and sensitive to difficult areas in his case. One wishes that these physicians had been present in court on October 11 and 12, 1984, when this defendant responded quickly and readily to questions on direct examination; and present when, even more significantly, he easily handled questions on cross-examination and then, on redirect examination, when his attorney dealt with points and matters raised on cross-examination given certain evidence in the case that, based upon his cross-examination, he felt he had to answer and explain. It was a masterful performance, one I think that would have astonished Drs. Portnow and Berger.

It is certain that, had I decided the Section 4244 matter as urged by Drs. Portnow and Berger, it would have been a miscarriage of justice. So that there is no doubt: I do not charge that Drs. Portnow and Berger lied in the testimony they presented before me. What is clear, however, is that they were misled and deceived by the defendant. This raises disquieting concerns about the utility, accuracy and reliability of psychiatric testimony, not only as to Drs. Berger and Portnow here, but generally.

DEFENDANTS' MOTION FOR MISTRIAL

[4] During the rebuttal summation of the Assistant United States Attorney she described Spatola's role in this trial as one that was designed to "cut all the defendants loose" except for Antonio Gambino. Referring not only to Spatola's testimony, but also to argument of his attorney, she then said the following:

MISS MURPHY: ". . . you saw also during the course of this case how the defendants used codes in their conversations. How they were careful about using the telephone. And would avoid the use of the telephone in certain instances.

"But now they stand before you and they were caught by the police.

"You heard Anthony Spatola give you testimony which, if believed, would cut each of the defendants loose in this courtroom who was not on videotape.

"You heard his attorney give arguments to you, sometimes he directed you to the evidence, sometimes he did not. However, his arguments, if accepted, would also show that Rosario Gambino and Erasmo Gambino are not guilty. In fact, you heard Rosario Gambino's attorney and Erasmo Gambino's attorney thank him for his services. And you may consider that in presenting this testimony to you, these defendants have continued their conspiracy and—"

MR. FISCHETTI: "Objection."

MR. EVSEROFF: "Objection."

MR. FISCHETTI: "Side bar."

THE COURT: "Objection—objection sustained. . . ."

The record thus reflects she was interrupted at this point by what occurred almost simultaneously: objections by counsel for the defendants Erasmo Gambino and Rosario Gambino and this court's sharp reprimand. Additionally, the court at once addressed the jury as follows:

THE COURT: "Objection—objection sustained.

"Ladies and gentlemen, you're instructed to disregard that, that statement by counsel was entirely improper. It was out of order and I'm reprimanding her right now."

Immediately thereafter, the court then polled each juror to determine whether the jury could follow the instruction that had just been given. Each juror answered in the affirmative.

Notwithstanding the corrective action so promptly taken by the court, all defense counsel moved for a mistrial. After taking the matter under advisement over the luncheon recess, the court denied the motion: the court's offer to give additional curative instruction was

considered by counsel for the defendants but rejected.

The statement by the Government is explained (although not justified) by the following circumstances. Based on its own experience, the court could not help but observe that the defendants had closely co-operated in presenting their case. The "musical chairs" retention of counsel by itself is suggestive of this. This court has never had a situation where during the course of pre-trial so many counsel have been in and out of a case. The high degree of co-operation between counsel for Rosario Gambino, Erasmo Gambino, Antonio Gambino and Mario Gambino, all from New York City, was marked. That counsel for Spatola was also co-operating closely with the other attorneys was also clear from this court's observations during the six week trial. That each attorney knew what the other attorney was going to cover on summation was apparent. By way of example, at one point counsel for Spatola in his summation said that he was not going to deal with a certain matter "because Mr. Evseroff will." Mr. Evseroff represented Rosario Gambino and summed up after counsel for Spatola.

Most significantly, Spatola during his testimony, in addition to presenting the bases for his entrapment claim, attempted to do what the Government charged, that is, "cut loose" all of the other defendants in the case (except for Antonio Gambino, who of course was on videotape and involved in numerous taped telephone conversations). Legitimate inferences could readily be drawn from Spatola's efforts to explain the meaning of words in conversations between him and others, including Rosario Gambino and Erasmo Gambino, that Spatola was lying in order to save those defendants.

Turning again to the summation of Spatola's counsel, obviously sensitive to the suggestion by the Assistant United States Attorney on her opening summation argument that Spatola's role was to exculpate the other defendants, he explained to the jury that the reason that Spatola in his testimony and he in argument were

endeavoring to exculpate Rosario Gambino and Erasmo Gambino was that Spatola was charged with being in a conspiracy with them. Presumably by this he meant that, in arguing that they were not involved, his client, Spatola, would thereby be exculpated. Yet Spatola had nothing to gain for himself on the conspiracy charge by exculpating Rosario Gambino and Erasmo Gambino. Whether they were found guilty or not made absolutely no difference insofar as the conspiracy charge against Spatola is concerned. This is because Spatola, by his entrapment claim, had admitted that he had participated willfully and knowingly in the conspiracy charged; his defense was that he had been entrapped into doing so. Obviously, therefore, Spatola and his attorney can be likened to the "officious volunteer" in dealing with the subject of the guilt or innocence of Rosario Gambino and Erasmo Gambino on the conspiracy charge.

Nor is it without significance that counsel for the other defendant who pleaded entrapment, Antonio Gambino, spent no more than an hour in his summation. Spatola's counsel, on the other hand, argued for between 4-5 hours, almost as much as the total time taken by all of the defense counsel together.

Indeed, what he was attempting to achieve was so clear to all in the courtroom that counsel for Erasmo Gambino, when he arose to address the jury in his summation, made the observation that:

> MR. FISCHETTI: "Thank you, Judge Lacey.
> "Thank you, Mr. Galluccio.
> "He gave my whole summation. I felt like an understudy sitting there waiting for somebody to get off to give me a chance to go on. He covered all the material—most of it, that concerns my client, Erasmo Gambino...."

This same declaration was made by counsel for Rosario Gambino when he commenced his summation.

The foregoing should not be construed as a denunciation by this court of the trial strategy pursued by the

defendants and their counsel. It was a strategy that was well-conceived and brilliantly executed. Defense counsel, all seasoned in the criminal defense field, thus surprised Government counsel in the way the defense of all of the defendants was contoured and presented. They should not be condemned for this. Instead, their ability should be recognized for what it was, representation of the highest order.

There can be little doubt that the jury understood what was happening. The jury knew what the court has already noted: that Spatola's effort to "cut loose" Rosario Gambino and Erasmo Gambino was not related at all to the fact that they along with him were charged in the conspiracy count. The jury had to know that even if they were freed, Spatola's position as an alleged member of the conspiracy charged in Count 2 was not improved thereby: given the evidence as presented by Spatola himself, the conspiracy charged still existed, with Spatola an admitted member of it; only the co-conspirators changed, if the jury believed his testimony.

Notwithstanding the foregoing, the Government's comment should not have been made. As I stated during the trial, however, the comment consisted of no more than a half dozen words which were buried under counsel's objections and the court's immediate instruction and polling of the jury and reprimand of Government counsel. The sense that this court has of the entire situation is that the Government's cause suffered seriously from the incident. Sensitive as this court was to the ambiance of the courtroom at that moment, there was no injury to the defendants' cause. Accordingly, the motion for mistrial was denied.

RULE 23(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Fed.R.Cr.P. 23(b) provides as follows:

[5] "Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more juror for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."

The jurors retired to deliberate at 4 p.m. on October 19, 1984. They deliberated until 6 p.m. on October 19 and were thereafter sequestered until they reached a verdict.

On October 20, their deliberations began at 9 a.m. and concluded at 10 p.m. On October 21 deliberations commenced at 10:15 a.m. and continued throughout the day, until the following occurred at approximately 8 p.m.

At 8 p.m. the jurors, through their foreman, transmitted to the court a note stating that enclosures transmitted, consisting of three sheets of paper, had been discovered in the exhibit box, although not marked into evidence. These documents were immediately marked by the court as Court Exhibits, CE-22(a), (b), and (c).

The matter was immediately taken up in open court with counsel and in the presence of all of the defendants. The documents were identified by Assistant U.S. Attorney Murphy as hers and as setting forth notes she had made about the case sometime prior to trial. Immediate inquiry of the jury, conducted in the presence of counsel and the defendants, leads this court to find that these documents had been inadvertently deposited in the bottom of the box in which all of the exhibits had also been placed before being carried to the jury room, first on October 20

and again on October 21. While the United States obviously is at fault for not having exercised care to keep these notes out of the box in question, defense counsel cannot escape blame for this incident. At least twice the court directed that all counsel, not only counsel for the United States, but also counsel for the defendants, review all of the exhibits before they were sent to the jury. Such a review obviously called for inspection not only of the exhibits themselves but also the box which contained them. Somehow these notes went undetected. Thus I must expressly find that the negligence of all counsel contributed to this occurrence.

At the suggestion of defense counsel, the court had brought the jury into the courtroom. Questions quickly elicited the fact that only two jurors had seen any of the three documents involved. One, Mrs. Susan Peach, Juror Number 4, had seen only Court Exhibit 22(a). This exhibit is innocuous. It does little more than list and briefly describe the counts of the indictment. She had no discussion with any of the other jurors about the contents of this document. On the other hand, Mr. Ojdana saw Court Exhibit 22(b), although he did not discuss it with any jurors. This exhibit contains notes referring to the defendant Mario Gambino. While I do not attach the importance to this exhibit that is given it by counsel for this defendant, it is more significant than Court Exhibits 22(a) and (c) (neither saw 22(c)).

At the request of defense counsel, Mr. Ojdana was questioned at side bar out of earshot of the other jurors. He indicated that he perceived the specifc reference to Mario Gambino as having to do with another defendant, Antonio Gambino. On this basis, the attorney for Mario Gambino contended that this juror had made a connection between the exhibit in question and the trial testimony which in turn implanted a fixed conclusion in the mind of this juror that substantially prejudiced his client. At the conclusion of the hearing, at approximately 9 p.m. on October 21, all defense counsel joined in a

motion to remove Mr. Ojdana and substitute for him the first alternate. I took the matter under advisement.

The court was impressed with the fact that Mr. Ojdana had not discussed the contents of Court Exhibit 22(b) with any other jurors and that Mr. Ojdana was able to assure the court that he would follow its instructions that this document had absolutely nothing to do with the case and was to be disregarded. Nonetheless, the court understood the concerns of defense counsel, particularly counsel for Mario Gambino.

Addressing the matter of remedy, it was clear that all defense counsel felt that, as one of them put it during the hearing, not only justice but the "appearance of justice" was important here and that, accordingly, Mr. Ojdana should be removed. After considering the matter carefully over the evening, and after hearing further argument from defense counsel the next morning, October 22, the court decided to grant the application made by all defense counsel to the extent they asked for the removal of Mr. Ojdana, doing so only after advising counsel that, were I to grant their application as to removal, I was not going to grant the second part of their application, namely, "plug-in" an alternate, but rather would utilize Fed.R.Cr.P. 23(b) and proceed with 11 jurors. While objecting to the latter procedure, and without waiving their right to have an alternate substituted, the defendants continued to move for removal of Ojdana, contending he was "tainted."

Finding "just cause," I excused Mr. Ojdana, appropriately instructed the jury as requested by counsel, and thereafter, later that day, a verdict was rendered by the jury of 11 persons.

There can be no issue over whether there was "just cause," under Rule 23(b). Indeed, given the incident, and the insistence of all defense counsel that Mr. Ojdana, by reading Court Exhibit 22(b), had been tainted, and given the Court's view that the position of the defendants was not without merit, the court could not have done otherwise

than excuse the juror. It is impossible to conceive of a clearer case of "just cause."

While explicitly contending that just cause required the juror's removal, the defendants argued that the court should follow cases such as *United States v. Phillips,* 664 F.2d 971 (5th Cir. 1981) and substitute an alternate for the excused juror.[4] It is necessary to place this argument in context.

At the time that the jury retired to consider its verdict, the court decided not to discharge all alternates. See Fed.R.Cr.P. 24(c). Throughout the period of deliberations two alternates were kept in sequestration, while being isolated from the jury. This was done notwithstanding the fact that defense counsel questioned the procedure. The court indicated that it was holding the two alternates to guard against any problems that might arise during deliberations, at the same time advising counsel that the court would not take silence of counsel as consenting to the procedure. As the court noted at the time, it would entertain further argument should an emergency arise that required consideration of what was to be done to avoid a mistrial should a juror be excused during the course of deliberations.

When the need for further consideration of the issue of substitution of an alternate arose, defense counsel, in contending that an alternate should be substituted, noted that the court had not discharged two alternates but had kept them. From this presumably counsel were contending that the court had somehow estopped itself from following some other course other than substitution of an alternate.

This judge has been and is presently a member of the Supreme Court Advisory Committee on the Federal Rules of Criminal Procedure. In 1982 the Advisory

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[4] The Court of Appeals for this Circuit has not decided the issue.

Committee proposed an amendment to Fed.R.Cr.P. 23(b).[5] As amended, effective August 1, 1983, this rule reads as follows: "Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more juror for any just cause after trial commences. *Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.*"

The underscored portion was what was added by amendment. The amendment addresses the specific problem of how to deal with the situation involving the necessity of excusing a juror after deliberations of the jury have been underway. Cases such as *United States v. Phillips, supra,* had projected the matter to the attention of the Advisory Committee. Thereafter, the Advisory Committee had submitted to the bench and bar alternate courses for dealing with the *Phillips*, situation. One course was to amend Rule 24 so that, as in *Phillips,* alternates could be substituted for jurors who, during deliberations, were no longer able to serve. The other procedure that was advanced was permitting the judge to excuse a juror and proceed with 11 jurors.

The response of the bench and bar to these proposals resulted in the Advisory Committee adopting the second of these two procedures, resulting in the amendment to Rule 23(b).

The court is frank to say that had it been confronted with the necessity of excusing two jurors, it would have seriously considered substituting the two alternates. This

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[5] This proposal was approved by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference and the Supreme Court and, after Congress' inaction, became effective under 18 U.S.C. Section 3771.

is because the amendment to Rule 23(b) does not allow the court, on its own motion, to go below 11 jurors, always assuming of course that "just cause" exists for excusing one juror. Fortunately, however, the hearing that was immediately conducted demonstrated that only one juror had been exposed to Court Exhibit 22(b), and thus only he had to be excused.

Counsel for the defendants contended that, given the line of cases represented by *Phillips* and their unanimous agreement on substituting an alternate, the court had to follow that course. What counsel overlooked was the fact that the very reason for the 1983 amendment to Rule 23(b) was to deal with the *Phillips* situation. Indeed, the trial judge in *Phillips* had to adopt a procedure in violation of Rule 24(c) because there was no provision at that time in Rule 23(b) to permit him to proceed with a jury of 11.

Moreover, as is set forth in the extensive Advisory Committee note, there are several profound difficulties in substituting an alternate after a jury has been deliberating for many hours, here well over 20 hours. Since they are set forth in the notes, I will not repeat them here.

While recognizing that had the court been required to excuse two jurors and thus substitute two alternates, or at least one, it would have had to confront the problems referred to in the Advisory Committee note, there can be no question but that Rule 23(b) is the better solution where only one juror has to be excused; indeed, it is the only procedure now permitted by the rules, after consideration had been given by the Advisory Committee to the *Phillips* line of cases.

Only two more points need be addressed. First, the decision to proceed with 11 jurors rather than declare a mistrial cannot be questioned. The trial itself consumed 6 weeks; the jury deliberations had already lasted over 20 hours. Given this investment of judicial resources, a declaration of a mistrial would have been unthinkable in view of the alternative furnished by Rule 23(b). Moreover,

all defense counsel, with one possible exception, stated that they did not want a mistrial. The defendant most directly affected, Mario Gambino, was vehement in his objection that a mistrial not be declared. Indeed, his counsel stated that his client had told him that he did not want to go through another trial. Parenthetically, it is noted that the jury ultimately acquitted this defendant. In any event, having found "just cause" as hereinabove discussed, the court exercised its discretion to proceed under Rule 23(b).

Finally, counsel for the defendants, in urging that this court proceed to substitute an alternate, did not attack Rule 23(b). Thus, the record is barren of any argument by defense counsel that somehow Rule 23(b) was flawed or faulted. Certainly, it cannot now be contended that there is any imperfection, constitutional or otherwise, in the procedure permitted under Rule 23(b).

For the foregoing reasons, the application made by the defendants for substitution of an alternate, rather than proceeding under Rule 23(b), was denied.